

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS
CAUSE NO.: 2006-CA-01156

VONDELL O. SUMRALL, JR.
APPELLANT

VERSUS

HEATHER MARIE SUMRALL
APPELLEE

ORIGINAL BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

**APPEALED FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI**

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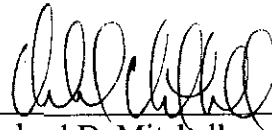
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to the Mississippi Rules of Appellate Procedure 28(A)(1) the following listed persons have interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

- | | | | |
|----|------------------------------|----|--------------------------------|
| 1. | Vondell O. Sumrall, Jr. | -- | Appellant |
| 2. | Heather Marie Sumrall | -- | Appellee |
| 3. | Jay L. Jernigan | -- | Attorney for Appellant |
| 4. | Samuel S. Creel | -- | Trial counsel for Appellee |
| 5. | Michael D. Mitchell | -- | Appellate counsel for Appellee |
| 6. | Chancellor Franklin McKenzie | -- | Trial Court Judge |

So Certified this the 12 day of April, 2007.

Respectfully Submitted,



Michael D. Mitchell
Appellate counsel for Heather Sumrall

TABLE OF CONTENTS

Certificate of Interested Persons	i
Table of Contents	ii
Table of Authorities	iii
Statement of Issues	1
Statement of the Case	1
Statement of the Facts	2
Summary of the Argument	8
Law and Argument	8
Conclusion	11
Certificate of Service	12

TABLE OF AUTHORITIES

CASES CITED

<u>Albright v. Albright</u> , 437 So.2d 1003, 1005 (Miss. 1983)	8
<u>Copeland v. Copeland</u> , 904 So.2d 1066, 1074 (Miss. 2004).....	8, 9
<u>Horn v.. Horn</u> , 909 So.2d 1151 (Miss. Ct. App. 2005)	10
<u>Pearson v. Pearson</u> , 761 So.2d 157, 162 (Miss. 2000)	8

STATEMENT OF THE ISSUES

THE OPINION OF THE COURT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND WAS BASED UPON A CORRECT INTERPRETATION OF THE ALBRIGHT FACTORS PREVIOUSLY SET FORTH BY THIS COURT

STATEMENT OF THE CASE

This case arose out of the marriage relationship of Vondell Sumrall, Jr. and Heather Marie Sumrall. The Sumralls separated and approached the Chancery Court of the Second Judicial District of Jones County, Mississippi initially for a Child Custody Order. The initial custody Order specified that each party was to have the care, custody and control of the minor child for two continuous weeks, and alternate custody between the parents.

Subsequently a Complaint for Divorce, Answer, and Counter-Claim for relief was filed by the parties. At the time of the trial, the parties had resolved all of the issues regarding the divorce and property division between themselves, leaving only the issue of child custody and visitation to be decided by the Chancellor. After a trial where both sides were allowed to put on testimony and evidence, the trial court ruled in favor of Heather Marie Sumrall. This appeal arises from Vondell being aggrieved of the Chancellor's award of child custody to Heather Marie Sumrall.

STATEMENT OF THE FACTS

Heather Marie Sumrall and Vondell Sumrall, Jr., were married and had a child. At the time the child was conceived Heather Marie Sumrall was sixteen (16) years of age. (T. p. 66). Vondell Sumrall, Jr. was a number of years older than Heather. (T. p. 67). Vondell and Heather lived together as husband and wife for about a year and one-half to two years before they separated. (T. p. 66).

At the time of separation, Vondell and Heather had been living with Vondell's parents in the Second Judicial District of Jones County, Mississippi. (T. p. 16; 66). Heather left the marriage and moved to her mother's home in Gatesville, TX at the age of nineteen (19). (T. p. 66). An action was filed regarding the custody of Luke Sumrall, born January 19, 2000, being cause number 2001-0995. (T. p. 16; 3). This action resulted in the issuance of a Temporary Order which was entered into evidence as an Exhibit to the trial testimony which occurred on June 13, 2006. (T. p. I; 2-3). The parties announced to the Court on June 13, 2006, they had agreed to a divorce on grounds of irreconcilable differences leaving only the question to be decided by the Court as custody of the parties' minor child. (T. p. 2-3).

The first witness called by Vondell Sumrall, Jr., was Heather Marie Sumrall as an adverse witness. (T. p. 4). Heather testified that she currently resided in the state of Texas. (T. p. 4). Heather testified that she had resided in three or four different cities in Texas since her separation from Vondell in Mississippi. (T. p. 5-6). Heather testified she lived with her mother for two or three months after the separation until she found a job and was able to move out on her own. (T. p. 6). Heather further testified that she had worked for the same company, Wal-Mart, since moving to Texas in 2001, and that she has been promised another full-time position when it

becomes available. (T. p. 8; 9).

Heather also testified, adversely, that she has lived with her boyfriend, Michael Walker, in Hamlin, Texas. (T. p. 9). Michael is employed at a plant manufacturing dog food, and she and Michael intend to get married and have children after her divorce from Vondell becomes final. (T. p. 9-10). Heather testified she and the minor child attended church on a somewhat regular basis throughout the time period she has lived in Texas. (T. p. 10-12). Heather testified that she, Michael, and the minor child reside in a two-bedroom house that Michael is purchasing in Hamlin, TX. (T. p. 12). At the end of her cross-examination, Heather stated she was asking the Court to grant her custody of her minor child, but she had no objections to Vondell being granted unsupervised, unrestricted visitation with the minor child. (T. p. 15).

The direct examination of Heather Sumrall occurred later in the trial of this matter as her attorney reserved his right to question her at a later time. (T. p. 15). However, for purposes of clarity regarding the testimony of each witness, this Brief will cover the direct examination of Heather Sumrall at this time. Heather testified she moved in with her mother in Texas after she had separated from Vondell. (T. p. 66-67). Heather stated she took care of herself and the minor child in Texas and was trying to find a job. (T. p. 67-68). Heather testified she found a temporary job with Wal-Mart in September of the year she separated from Vondell at the age of nineteen, and that she continued to be employed by Wal-Mart, being transferred from store to store as she moved residences. (T. p. 68).

Heather testified that she did not finish high school because she got pregnant with Vondell's child and had to drop out of school because of sickness associated with the pregnancy. (T. p. 68). Heather testified she obtained her GED and was raising her minor child in Texas by

herself. (T. p. 68). Heather testified Michael, her boyfriend, treats her children as if they were his own, that she was willing to immediately go take a drug test, and that she was not trying to keep the minor child from either his father or his paternal grandparents. (T. p. 68-69). Heather testified, since her separation from Vondell, she has shouldered the responsibility of providing food, clothing, and shelter to herself and her children without the assistance of her parents. (T. p. 71).

Heather also testified about the custody arrangements between herself and Vondell. Heather testified that she and Vondell had reached an agreement in the previous cause whereby they would share custody of the minor child, with each parent having equal time with the minor child and no child support payments by either Heather or Vondell. (T. p. 70; 79). Heather testified that this custody situation remained until she sent the minor child to visit with his father for Thanksgiving, and his Father, and Grandparents, refused to return him to her custody. (T. p. 79-80). Heather testified she and the minor child had a very close relationship. (T. p. 71). The minor child also has a close relationship with his half-sibling and Michael, his soon to be step-father. (T. p. 72). Heather testified she had trouble being consistent in potty training the minor child due to the fact that he would be with her for a time and then be with his father (grandparents) for a time. (T. p. 73).

Heather testified she worked from eleven (11) a.m to eight (8) p.m. on her days to work, and that Michael worked from six (6) to six (6) five or six days a week at the factory. (T. p. 75). In response to the Court's questioning Heather stated she would pick the minor child up from school on her lunch hour and take him to a baby-sitter with his brother during the week. (T. p. 75-76). In response to the Court's question about the child's health, Heather stated that the child

was overweight since he had been with his grandparents for several months and they made him (the minor child) stay inside, watch TV and play video games. (T. p. 75-77).

Vondell Sumrall, Sr., hereinafter referred to as "Mr. Sumrall," and Vondell Sumrall, Jr., hereinafter referred to as "Vondell," testified on behalf of Vondell Sumrall, Jr. Vondell testified he lived immediately next to his parents in Jones County, Mississippi, and had lived there for seven or eight years, including the time period he and Heather lived together. (T. p. 16).

Vondell testified he wanted custody of his minor child due to the alleged instability in the home environment provided by Heather. (T. p. 17). Vondell testified that the minor child stays in the home of Vondell's parents, the grandparents of the minor child, when the child is with Vondell. (T. p. 18). Vondell testified he was employed by his father to do odd jobs around the house for which his parents pay all of his bills and help take care of Vondell's minor child with Heather. (T. p. 18). Vondell further testified that he, and the minor child when present, attend church every Sunday. (T. p. 18).

On cross-examination Vondell admitted he had made no concrete steps in repairing his trailer damaged by Hurricane Katrina in the ten months since the hurricane hit. (T. p. 24).

Vondell also admitted that he was 21 or 22 and Heather was 17 when they married. (T. p. 24-25). Vondell testified, on cross-examination, he had worked with his parents for a significant amount of his working life, and that he had rarely worked in a public job outside of his parents money and influence. (T. p. 25-27). Vondell testified his parents approached him to help them around the house and at their jobs in return for having his bills paid and spending money. (T. p. 25-29).

Vondell admitted on cross-examination he and the minor child lived with his parents and

sister. (T. p. 30). Vondell admitted he did not claim Heather was unfit to have the custody and control of their minor child (T. p. 30). In response to questioning by opposing counsel and the Court, Vondell admitted he and Heather had an agreement to split custody of the minor child and, under this agreement, Heather would enroll the minor child in kindergarten in Texas. (T. p. 30-33).

Vondell further testified to the minor child's lack of potty training. (T. p. 33). In the concluding minutes of his testimony Vondell admitted he was 30 years of age, living with his parents, and the minor child actually lives with Mr. and Mrs. Sumrall. (T. p. 34). Vondell admitted he does not cook food for his son nor does he wash his clothes. (T. p. 35). Vondell further admitted he cannot testify regarding Heather's performing the household chores necessary to raise a child as he lived in Mississippi and could not say what she did or did not do. (T. p. 35-36). Vondell further admitted he had not kept a steady job outside the home in a number of years. (T. p. 38).

In response to questioning by the Court, Vondell testified his parents often let him use their vehicles. (T. p. 41-42). Vondell further testified his parents pay his bills for him and give him \$200-\$300 per month for him to keep and spend. (T. p. 42). Vondell testified he cuts grass once a week for four hours or so, helps his parents in the garden, and runs errands for his parents in return for the money and other support they give. (T. p. 42-44). Vondell testified his parents were getting older and having trouble with their legs and knees which gives them problems bending and stooping. (T. p. 44-45).

Mr. Sumrall was called next to testify on behalf of Vondell. Mr. Sumrall testified he and Mrs. Sumrall furnished everything for the minor child and take the minor child to and from

school each day. (T. p. 48-49; 51). Mr. Sumrall testified Vondell helps him around the family homeplace in return for having all of his (Vondell's) bills paid and being given spending money by his parents. (T. p. 49). Mr. Sumrall testified he cooks for the minor child, and that he and the minor child had a close relationship. (T. p. 50). Mr. Sumrall testified the minor child spends most nights in his home rather than with Vondell, the minor child's father. (T. p. 56). Mr. Sumrall testified his wife cleans the minor child up and bathes him. (T. p. 56-57). Mr. Sumrall testified Vondell worked outside the home with the family businesses while he (Mr. Sumrall) takes care of the minor child. (T. p. 57).

On cross-examination Mr. Sumrall testified he would make the decisions regarding the minor child and taking him to the doctor for problems such as the alleged lack of potty training. (T. p. 62-63). Mr. Sumrall admitted he had not followed the doctor's advise regarding the next step to take with the potty training issue. (T. p. 63). In response to questioning by the Court, Mr. Sumrall testified hearsay was the reason he made the decision not to send the minor child back to Texas under the agreement with Heather Sumrall, and no direct testimony was put before the court regarding the accusations made in the hearsay testimony not admitted into evidence. (T. p. 63-65).

SUMMARY OF THE ARGUMENT

The trial court correctly applied the Albright factors in making its child custody determination. The Chancellor is afforded wide discretion in his decision and if his opinion and judgment is supported by substantial, credible evidence in the record, his decision will only be overturned for an abuse of discretion or if he applied the wrong legal standard.

LAW AND ARGUMENT

THE OPINION OF THE COURT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND WAS BASED UPON A CORRECT INTERPRETATION OF THE ALBRIGHT FACTORS PREVIOUSLY SET FORTH BY THIS COURT

The “polestar consideration in child custody cases is the best interest and welfare of the child.” Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983). The Albright court listed several factors which should be considered by the Court in making its determination of which parent should have custody of their minor child. These factors have been cited to this court numerous times. They are: the age of the child; the health and sex of the child; a determination of which parent has had the continuing care of the child prior to separation; which parent has the best parenting skills and the willingness and capacity to provide child care; employment responsibilities of each parent; physical and mental health of the parents and the child; moral fitness of the parents; home, school, and community record of the child; stability of the home environment and employment of each parent; the choice of a child old enough by law to make a choice; and other factors which may be relevant. Id see also Copeland v. Copeland, 904 So.2d at ¶31.

The standard of review in domestic relations matters is limited. Pearson v. Pearson, 761

So.2d 157, 162 (Miss. 2000) see also Horn v. Horn, 909 So.2d 1151 (Miss. Ct. App. 2005). “We review the facts underlying a divorce decree in the light most favorable to the appellee.” Horn v. Horn, 909 So.2d. at ¶6., A Chancellor’s decision will be overturned only if his findings are not supported by substantial evidence or were clearly erroneous or manifestly wrong. Id. The Chancellor will be overturned if he applies the wrong legal standard. Id. “It is appropriate to consider here that our limited scope of review directs that ‘[w]e will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interests of the child.’” Copeland v. Copeland, 904 So.2d 1066, 1074 (Miss. 2004).

In the present case the Court went through an extensive on-the-record review of the Albright factors as they related to its Opinion and Judgment. The litigants in the case at bar are the natural parents of the minor child; however, the court recognized Vondell is entirely dependent upon his parents for his livelihood. The Court found the minor child’s paternal grandparents provided the food, clothing, shelter, and parenting skills necessary to raise the child when the child visited with his father.

Both Vondell and Mr. Sumrall testified at the trial of this matter. They agreed that the minor child lived with Mr. and Mrs. Sumrall when he was “with Vondell.” There was no contradiction of this testimony. Vondell totally failed to put on any proof that Heather had provided an environment which was not wholesome and healthy for her minor children. Vondell’s main issue on this appeal seems to be the lack of evidence about Heather’s boyfriend. However, as the trial court pointed out to Vondell’s counsel, it was his (Vondell’s) responsibility to put on evidence regarding any threat Heather’s boyfriend may allegedly be to the minor child. Vondell failed to attempt to depose or subpoena Michael Walker to enable him to introduce any

such testimony into evidence for consideration by the Chancellor.

The Court found, from the testimony of Mr. Sumrall, when the child was with Vondell that Mr. Sumrall took the child to and from school. Mrs. Sumrall, Vondell's mother, washed the child's clothes, and cooked food for the minor child to eat. The testimony in this cause showed that Vondell took no part in caring for his minor child except as requested by his parents the minor child's paternal grandparents.

In the present case Heather offered uncontradicted testimony she had provided for her minor child almost entirely on her own since her separation from Vondell. Heather has worked at Wal-Mart since her separation from Vondell and had transferred to different stores in the chain as she moved within Texas. Heather has another minor child who has a good relationship with the minor child involved herein.

In the case at bar the custody dispute was, as recognized by the trial court, between the natural mother and the paternal grandparents. Vondell is totally dependent upon his parents for his income and his job. There was uncontradicted testimony that the paternal grandparents provided Vondell's food, clothing, shelter, and spending money. The testimony clearly showed that Mr. Sumrall, the paternal grandfather, made the decisions regarding when the minor child would be taken to the doctor, what sort of medical treatment he would receive, and any other decisions which have to be made regarding the minor child.

The trial court in the present case listened to the testimony presented by both parties. The court applied the Albright factors in its opinion which is in the trial transcript. In the opinion of the trial court the Albright factors clearly weighed in favor of granting custody to Heather Sumrall. The opinion of the trial court was supported by substantial evidence in the record.

This court should affirm the decision of the trial court as being supported by substantial, credible evidence in the record and having not applied an incorrect legal standard

CONCLUSION

The Chancellor's decision in the case at bar was amply supported by the evidence and testimony adduced at trial. The Chancellor went through the Albright factors as they related to his decision in his Opinion from the bench after the trial of this matter. The Judgment of the Chancellor in the present case is not an abuse of his discretion, is not clearly erroneous, and he did not apply an incorrect legal standard. This Court should affirm the Opinion and decision of the Chancellor issued in his Opinion from the Bench on this matter.

CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that a true and correct copy of the above and foregoing Brief of the Appellee has been hand delivered to:

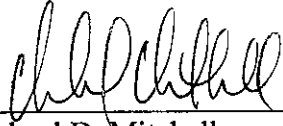
Hon. Chancellor Franklin McKenzie, Jr.

Hon. Samuel S. Creel, Jr.

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So Certified this the 12th day of April, 2007.



Michael D. Mitchell