

**COPY**

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CAS**  
CASE NO. 2006-~~YS~~-01265

**ORA JACKSON WEEKS**

**APPELLANT**

**VS.**

**FILED**

**JUL 02 2007**

**MONTRIEL WEEKS, SR.**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**APPELLEE**

---

**APPELLANT'S BRIEF**

---

**ALSEE MCDANIEL, MSB NO. [REDACTED]  
NORTH MS RURAL LEGAL SERVICES  
P.O. BOX 858, 159 N. HINDS STREET  
GREENVILLE, MS 38702  
(662) 335-8203**

**ATTORNEY FOR APPELLANT  
ORA JACKSON WEEKS**

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CASE NO. 2006-TS-01265**

**ORA JACKSON WEEKS**

**APPELLANT**

**VS.**

**MONTRIEL WEEKS, SR.**

**APPELLEE**

**CERTIFICATE OF INTERESTED PARTIES**


The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court, and/or the Judges of the Court of Appeals, may evaluate possible disqualification or recusal:

- |  |   |                        |
|--|---|------------------------|
| (1) Ora Jackson Weeks<br>Indianola, MS                               | - | Appellant              |
| (2) Montriell Weeks, Sr.<br>Indianola, MS                            | - | Appellee               |
| (3) Alsee McDaniel, Esq.<br>P.O. Box 858<br>Greenville, MS 38702     | - | Attorney for Appellant |
| (4) Bennie L. Richard, Esq.<br>P.O. Box 1404<br>Greenville, MS 38702 | - | Attorney for Appellee  |

(5) Hon. Jane R. Weathersby  
P.O. Drawer 1380  
Indianola, MS 38751

Chancellor  
9<sup>th</sup> Chancery District

SO CERTIFIED this the 2<sup>nd</sup> day of July, 2007.

  
**ALSEE MCDANIEL, MSB NO. 2347**  
North Mississippi Rural Legal Services  
Post Office Box 858, 159 N. Hinds Street  
Greenville, MS 38702  
(662) 335-8203 / (662) 335-7500 (Facsimile)  
**ATTORNEY FOR APPELLANT**

## TABLE OF CONTENTS

|                                      |      |
|--------------------------------------|------|
| I. CERTIFICATE OF INTERESTED PARTIES | i-ii |
| I. TABLE OF CONTENTS                 | iii  |
| II. TABLE OF AUTHORITIES             | iv   |
| III. STATEMENT OF ISSUES             | 1    |
| IV. STATEMENT OF THE CASE            | 2    |
| V. SUMMARY OF ARGUMENT               | 4    |
| VI. ARGUMENT                         | 5    |
| VII. CONCLUSION                      | 10   |
| VIII. CERTIFICATE OF SERVICE         | 11   |

## **TABLE OF AUTHORITIES**

|   | <b><u>PAGE(S)</u></b> |
|---|-----------------------|
| 1. <u>Albright v. Albright</u> , 437 So.2d 1003 (Miss. 1983)      | 3,4,5,6,10            |
| 2. <u>Brekeen v. Breekeen</u> , 880 So.2d 280 (Miss. 2004)        | 5,6,7                 |
| 3. <u>Brock v. Brock</u> , 906 So.2d 879 (Miss. Ct. Of App. 2005) | 6                     |
| 4. <u>Hollon v. Hollon</u> , 784 So.2d 943 (Miss. 2001)           | 5                     |
| 5. <u>Moak v. Moak</u> , 631 So.2d 196 (Miss. 1994)               | 6                     |
| 6. <u>Williams v. Williams</u> , 656 So.2d 325 (Miss. 1995)       | 5, 6                  |

## **STATUTES, RULES, ETC.**

|                                  |   |
|----------------------------------|---|
| 1.Miss. Rules of Evidence 901(a) | 9 |
| 2.Miss. Rules of Evidence 901(b) | 9 |
| 3.Miss. Rules of Evidence 902    | 9 |

**STATEMENT OF ISSUES**

- I. WHETHER THE CHANCELLOR'S DECISION AWARDING CUSTODY OF THE MINOR CHILDREN TO APPELLEE WAS CLEARLY ERRONEOUS OR AN ABUSE OF DISCRETION IN THE APPLICATION OF THE ALBRIGHT FACTORS
- II. WHETHER THE COURT ERRED IN ADMITTING AND CONSIDERING THE LIST OF PRIORS OF TREMEIN EARVIN, A NON-PARTY, IN APPLYING THE ALBRIGHT FACTORS TO APPELLANT

## STATEMENT OF THE CASE

The parties hereto, Montriell Weeks, Sr., and Ora Jackson Weeks, are both adult residents of Indianola, Sunflower County, Mississippi and were married on March 18, 2005. They subsequently separated on June 30, 2005 (Record Vol.1, page 6). Two(2) children were born to the parties prior to the marriage, namely: Montriell Weeks, Sr., a male minor child, born May 1, 2001; and Maquirria Weeks, a female minor child, born February 6, 2005 (Record Vol.1, page6).

On October 19, 2005, the parties filed their Joint Petition For Divorce in the Chancery Court of Sunflower County, Mississippi alleging irreconcilable differences, and specifically reserving issues relating to the paternity, custody, and support of the two minor children herein. (Record Vol.1, page 5). At the trial of this cause on March 7-8, 2006, Appellant, Ora Weeks, presented evidence of Appellee's physical violence, harassment and verbal abuse against her, including: (1) breaking out windows in her apartment, while the children were present, and removing the furniture from the apartment, including the children's beds and furniture (Tr.Vol.1, pages 111-113; Tr. Vol. II, page 289); (2) calling Mrs. Weeks unsavory and profane names in public and in the presence of co-workers (Tr. Vol.1, pages 113, 151); (3) physically assaulting Mrs Weeks as she attempted to report to work at Dollar General Corporation, which resulted in Mr. Weeks being fired from his employment at Dollar General for workplace violence (Tr. Vol.1, pages 114-116; Exhibits Vol.1, pages 12-18); and (4) reporting an unsubstantiated complaint of alleged child abuse against Mrs. Weeks to the Sunflower County Department of Human Services (Exhibits Vol. 1, pages 19-22).

Appellee alleged at trial that Appellant was not fit to have custody of the minor children

herein based on her alleged adulterous relationship with Tremaine Earvin, which allegedly affected the children emotionally. (Tr. Vol. II, pages 242, 252-56). Each of his witnesses presented testimony purportedly of adulterous conduct of Appellant, occurring for the most part after the parties separated in June 2005.

At the time of trial, Mrs. Weeks had full-time employment at Dollar General, as well as, a substitute teacher in the Indianola School District (tr. Vol. 1, page 107). She was living in a two bedroom apartment with the two children herein, a home that was described by the DHS social worker, Alyce Clark, as extremely neat and clean, very nicely furnished, with everything in order, and no evidence of emotional abuse of the children (Tr. Vol. 1, pages 24-25; Exhibits Vol. 1, pages 19-22). On the other hand, Montrie Weeks was unemployed, having been fired from Dollar General for workplace violence against Mrs. Weeks. He was living with his parents and was totally dependent upon them while he went to school and tried to find a job (Tr. Vol. 1, pages 12-16; 36, 48-49; Tr. Vol. II, pages 272-73).

In its Ruling, the Chancery Court made findings : (1) that Ora Weeks was not morally fit to be awarded custody of the children because of her relationship with Tremaine Earvin; (2) that the children would not be in a safe, stable environment with Mrs. Weeks based on Mr. Earvin's criminal record; and (3) that the Court would not penalize Montrie Weeks for not having a job at this time because his family is supportive. Custody of the children was, therefore, awarded to Appellee, Mr. Weeks. (Tr. Vol. III, pages 321-23).

Appellant filed her Motion For Reconsideration alleging that the Albright factors were not properly applied. (Record Vol. I, pages 47-51). The Chancery Court entered an Order denying said Motion on June 28, 2006 from which Appellant filed her Notice of Appeal.



## SUMMARY OF ARGUMENT

The polestar consideration in child custody cases is the best interest and welfare of the child. While moral fitness of the parents is a factor to be considered in awarding child custody, it is but one of several factors. Awarding of custody is to be based on the totality of the circumstances as shown by the evidence.

In the instant case, the chancery court awarded custody of a 4-year old boy and a 2-year old girl to Appellee based primarily upon the moral unfitness of Appellant because of alleged adultery. The court's ruling placed too much weight on the moral fitness factor and disregarded evidence presented under the remaining Albright factors, and in doing so, impermissibly sanctioned Appellant in denying her custody because of alleged adultery. Where the trial court improperly considers and applies the Albright factors for determining the best interest of the children in regard to custody, an appellate court is obligated to find the court in error.

At the trial of this cause, the chancery court admitted into evidence and considered a criminal "priors report" of the individual with whom Appellant allegedly had an adulterous relationship, over Appellant's objections. This report was not authenticated as a public document and contained entries of not only alleged convictions, but also offense reports, against a person who never testified as a witness in the case. The admission and consideration of this document in applying the Albright factors was clearly erroneous.

Based upon the evidence, the award of child custody to Appellee was an abuse of discretion, clearly erroneous and should be reversed.

## LEGAL ARGUMENT

### STANDARD OF REVIEW

The standard of review in child custody cases is generally limited to a determination of whether the decision of the chancellor is manifestly wrong, clearly erroneous, or applied an erroneous legal standard. Williams v. Williams , 656 So.2d 325, 330 (Miss. 1995). The polestar consideration in child custody cases is the best interest and welfare of the child. Albright v. Albright , 437 So.2d 1003 (Miss. 1983).

Where the chancellor improperly considers and applies the Albright factors in making a child custody determination, an appellate court is obliged to find that court in error. Brekeen v. Brekeen , 880 So.2d 280 283 (Miss. 2004) (citing Hollon v. Hollon, 784 So.2d 943, 946 (Miss. 2001). In Brekeen, the Mississippi Supreme Court overruled the chancellor's award of custody to the father based on ex-wife's adulterous affair. The Court held that the award was an abuse of discretion and that the trial court placed too much weight upon moral fitness and disregarded evidence presented under remaining Albright factors; and in doing so, the court impermissibly "sanctioned" ex-wife by denying her custody of the child because of adultery.

I. WHETHER THE CHANCELLOR'S DECISION AWARDING CUSTODY OF THE MINOR CHILDREN TO APPELLEE WAS CLEARLY ERRONEOUS OR AN ABUSE OF DISCRETION IN THE APPLICATION OF THE ALBRIGHT FACTORS

It is clear under Mississippi authority that an award of custody of minor children is to be based upon the totality of circumstances as shown by the evidence, with the polestar consideration being the best interest and welfare of the child. Albright , supra; Moak v. Moak , 631 So.2d 196, 197 (Miss. 1994). An act of adultery alone is not determinative of child custody. It is only a factor to be considered. Brock v. Brock , 906 So.2d 879 (Miss. Ct. Of App. 2005); Breckeen v. Breckeen , supra, 880 So.2d at 283; Williams v. Williams, supra, 656 So.2d at 329; Albright v. Albright , supra, 437 So.2d at 1005. These authorities reaffirm that the totality of the evidence must be taken into account when making a child custody decision.

In the instant case, the Chancery Court of Sunflower County placed the great weight of its award of custody to Appellee on the moral fitness factor, finding that Appellant was not morally fit to be awarded custody of the minor children because of alleged adultery. (Tr.Vol.III, pages 321-323). The said ruling does not give due consideration to the evidence in the record to other Albright factors, including: (1) employment of the parties; (2) willingness and capacity of the parties to provide primary child care; (3) stability of the home environment; and (4) moral fitness of Appellee, as well as, Appellant.

At the time of the trial of this cause, Appellant, Ora Weeks, had stable, full-time employment at a Dollar General plant and as a substitute teacher in the Indianola School District. (Tr.Vol.I, page 107). She was living in a two bedroom apartment, with the two minor children

herein, a home that was described by DHS social worker, Alyce Clark, as extremely neat and clean, very nicely furnished, with everything in place, and no evidence of emotional abuse of the children. (Tr.Vol.I, pages 24-25; Exhibits Vol.1, pages 19-23).

On the other hand, Appellee, Montriell Weeks, Sr., was unemployed, having been fired from his job at Dollar General for workplace violence committed against Appellant, as well as, other infractions. (Tr.Vol.I, pages 12-16; Exhibits Vol. 1, pages 12-18). He was living with his parents, with no source of income, and totally dependent upon them for his support, while he went to school and tried to find a job. (Tr.Vol.I, pages 36, 48-49; Tr.Vol.II, pages 272-273). Moreover, Appellee had committed acts of physical violence, harassment and emotional abuse of Appellant as previously discussed herein. He had also been held in contempt of court for failing to pay child support for the minor children in the past and wholly failed and refused to provide any financial support to Appellant for said children from the date of separation of the parties in June 2005 until the trial herein in March 2006. (Exhibits Vol.1, pages 23-27; Tr.Vol.II, pages 296-297).

In considering the aforesaid evidence, the chancery court not only sanctioned Appellant for alleged adultery, but also, rewarded Appellee for not having a job, ruling that it would not "penalize" him for not having employment. (Tr.Vol.III, page 323). In point of fact, Appellee had been fired from his job at Dollar General due to his own misconduct in committing workplace violence against Appellant, as previously discussed.(Tr.Vol.I, pages 12-16; Exhibits Vol.1, pages 12-18). The court further disregarded the evidence regarding the other Albright factors. In these circumstances, there was clearly an abuse of discretion in the application of these factors in awarding custody of the minor children to Appellee. Breckeen v. Breckeen , 880 So.2d at 283.

**WHETHER THE COURT ERRED IN ADMITTING AND CONSIDERING THE**  
**LIST OF PRIORS OF TREMEIN EARVIN IN APPLYING THE ALBRIGHT**  
**FACTORS**

In its ruling, the chancery court made a finding that the minor children herein would not be in a safe nor a stable environment if placed in the custody of Appellant, Ora Weeks. This ruling was based, in substantial part, upon the alleged criminal record of Tremein Earvin, the individual with whom Appellant allegedly had an adulterous relationship (Tr.Vol .III, pages 321-322). Mr. Earvin never testified as a witness at the trial of this case.

The "criminal record" that the court referred to in its ruling was an alleged Priors Report of Tremein Earvin that the court admitted into evidence over Appellant's objection. This report was introduced by Appellee through the testimony of Officer Bennie Milton of the Indianola Police Department. It was not printed on any official letterhead of the Department and did not contain any seal, affidavit, nor other attestation as to its authenticity. In fact, Officer Milton testified that she didn't know who generated the report, and she was not completely certain of the particulars of how it was generated. ( Exhibits Vol.1, pages 40-44; Tr.Vol.I, pages 70-73). Additionally, the report contained entries not only of alleged convictions, but also of complaints and offense reports of which there were no convictions. Finally, Officer Milton testified that Appellee, Montriell Weeks, has a relative who is employed with the Indianola Police Department. (Tr.Vol.I., pages 72-73). In view of her lack of knowledge of who generated this report, its authenticity and credibility becomes even more questionable and should not have been admitted into evidence to avoid any appearance of impropriety.

The Miss. Rules of Evidence, Rule 901(a), provides :

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Section 901(b) goes on to provide illustrations of such authentication or identification, including the "Testimony of Witness with Knowledge", i.e. Testimony that a matter is what it is claimed to be. In the instant case, Officer Milton testified that the alleged Priors Report of Tremein Earvin is consistent with prior incident reports that she has seen. However, she did not know who generated the report, and it contained no signature of a custodian of the record as to its authentication that it was a record of the Indianola Police Department. (Tr.Vol.I, page 73; Exhibits 1, pages 40-44). Consequently, this report does not meet the requirements for its admissibility under Section 901(a); nor does it meet the requirements as a self-authenticated public document under Section 902.

Based upon the evidence of record, the admission of the alleged Priors Report of Tremein Earvin was erroneous. The chancery court's consideration and reliance upon this report as evidence in ruling on the application of the Albright factors as relates to the safety and stability of Appellant's home. In fact, this ruling was contrary to the evidence in the record from a social worker with the Mississippi Department of Human Services. The testimony and report of social worker Alyce Clark was that Appellant's home was neat and clean, and there was no evidence of abuse of the minor children. (Tr.Vol.I, pages 24-25; Exhibits Vol.1, pages 19-22).

## CONCLUSION

To disturb the factual findings of the chancellor in a child custody case, the reviewing court must determine that the findings and ruling of the court are manifestly wrong, clearly erroneous, or the court abused its discretion. Where the chancellor improperly considers and applies the Albright factors for determining the best interest and welfare of the child in regard to custody, an appellate court is obligated to find the chancellor in error.

While the moral fitness of a parent is a factor to be considered in determining child custody matters, adultery is not sufficient in and of itself to deprive a parent of custody. To the extent that the trial court places too much weight on the moral fitness factor and disregards evidence presented under the remaining Albright factors, it impermissibly sanctions a parent by denying custody because of adultery.

In the instant case, the chancery court's ruling places great weight on the alleged adultery of Appellant and lack of moral fitness of Appellant in awarding custody of the minor children to Appellee. Said ruling disregarded, and effectively rewarded Appellee for: his own lack of employment due to his own misconduct; his lack of income and being completely dependent on his parents; his lack of moral fitness as relates to his violent conduct in breaking into Appellant's residence and in assaulting Appellant as she attempted to report to work; his disregard for the welfare of the children by taking their beds from Appellant's residence and failure to provide financial support for them.

When the totality of the evidence is reviewed in this case, it is clear that the award of custody to Appellee is clearly erroneous, and that the court abused its discretion by sanctioning Appellant for alleged adultery and disregarding evidence on the remaining Albright factors.

**CERTIFICATE OF SERVICE**

I, Alsee McDaniel, certify that I have served a copy of the Appellant's Brief by regular U.S. Mail, postage prepaid, addressed to the following interested persons:

Hon. Bennie L. Richard  
Attorney for Appellee  
P.O. Box 1404  
Greenville, MS 38702

Hon. Jane R. Weathersby  
Chancellor, 9<sup>th</sup> Chancery District  
P.O. Drawer 1380  
Indianola, MS 38751

This the 2nd day of July, 2007.

  
ALSEE MCDANIEL  
ATTORNEY FOR APPELLANT