

IN THE SUPREME COURT OF MISSISSIPPI

LA'KIMBERLY DUDLEY

APPELLANT-DEFENDANT

VS.

NO. 2006-TS-01733

METYOR HARRIS

APPELLEE-PLAINTIFF

**APPEAL FROM THE CHANCERY COURT OF
LOWNDES COUNTY, MISSISSIPPI
HONORABLE ROBERT L. LANCASTER, CHANCELLOR**

ORAL ARGUMENTS REQUESTED

**BRIEF OF APPELLANT
LA'KIMBERLY DUDLEY**

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CERTIFICATE OF INTERESTED PERSONS

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 the possible disqualification or recusal.

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STATEMENT OF THE ISSUES

1. WHETHER THE CHANCELLOR ERRED IN FAILING TO CONSIDER ALL OF THE *ALBRIGHT* FACTORS WHEN MAKING HIS DECISION TO MODIFY CHILD CUSTODY AND CHILD SUPPORT.
2. WHETHER THE CHANCELLOR WAS CLEARLY ERRONEOUS IN DECIDING TO MODIFY CHILD CUSTODY AND CHILD SUPPORT.

STATEMENT OF THE CASE

This cause originated in the Lowndes County Chancery Court; Cause No. 2001-0702, in which the Mississippi Department of Human Services sued Metyor Harris (hereinafter "Appellee") for paternity and child support. The child support demanded was for the benefit of Jeremy L. Dudley, a minor (hereinafter "minor child") and on behalf of his natural mother La'Kimberly Dudley (hereinafter "Appellant"). Appellee signed a stipulated agreement of child support and admission of paternity. The Court approved the agreement on November 8, 2001 and entered an order for Appellee to pay child support in the amount of \$125.00 per month. Appellee failed to meet his obligation and was in arrears in December 2002 in the amount of \$1,350.00. The Court ordered that Appellee pay arrears at the rate of \$40.00 per month by order dated February 2003. **See Exhibit "A".**

On September 8, 2006, Appellee filed his Petition for Custody and Visitation and a hearing was held on the merits on August 28, 2006, before the Honorable Robert L. Lancaster in the Lowndes County Chancery Courtroom. **See Exhibit "B".** Appellee was represented by Curtis Austin, Esq. while Appellant was unrepresented by an attorney at the hearing. The Chancellor heard testimony from the Appellee, the Appellee's wife, the Appellee's brother, the Appellee's preacher and from the Appellant. **See Exhibit "C".** The Chancellor also admitted letters allegedly written by the minor child's school teachers into evidence. **See Exhibit "C".** Based upon the testimony of the Appellee and

his witnesses, which was filled with hearsay testimony, the Chancellor modified child custody and support in favor of the Appellee. **See Exhibit "D"**. Appellant subsequently appealed the Chancellor's decision.

SUMMARY OF THE ARGUMENT

The Chancellor's decision to modify child custody and support was clearly erroneous and an abuse of discretion. The Chancellor considered only some of the *Albright* factors when making his decision. His *Judgment* acknowledges that he does not have sufficient evidence or proof to apply the *Albright* factors but the Chancellor made his decision in spite of insufficient evidence. Additionally, the Chancellor was clearly erroneous in his final decision. The evidence provided at the child custody and support hearing was not only insufficient but did not warrant a ruling that it was in the best interest of the minor child for Appellee to have custody. The Chancellor allowed inadmissible hearsay evidence into the record and gave his decision regarding some of the *Albright* factors without explaining how he reached his decision.

ARGUMENT

1. **The Chancellor failed to consider all the Albright factors when making his decision to modify child custody.**

In all cases where custody is an issue the courts of Mississippi are to be guided, exclusively, by the best interest of the child. **Miss. Code Ann., §93-5-24.** The hallmark case for deciding the best interests of a minor child is *Albright*. **Albright v. Albright**, 437 So.2d 1003 (Miss.1983). The *Albright* case established multiple factors that should be considered and weighed by the trial court before making a custody decision. **Id.** The factors used to determine what are in the best interests of a child in regard to custody are: (1) age, health and sex of the child; (2) determination of the parent who had the continuity of care prior to the separation; (3) which parent has the best parenting skills and which has the willingness and capacity to provide primary child care; (4) the employment of the parents and responsibilities of that employment; (5) physical and mental health and age of the parents; (6) emotional ties of the parent and child; (7) moral fitness of the parents; (8) the home, school and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) stability of home environment and employment of each parent; and (11) other factors relevant to the parent-child relationship. **Id.** An appellate court must find a chancellor in error where the chancellor improperly considers and applies the *Albright* factors. **Hollon v. Hollon**, 784 So.2d 983, 946 (Miss. 2001). "It is essential in all cases where the issue of child custody is at issue that the court either enter a findings of fact or make detailed reference to each of these factors for the case to be even seriously considered on appeal." **N. Shelton Hand, Jr., Mississippi Divorce, Alimony and Child Custody, 76 (5th**

Edition, 2001 Supplement).

The Chancellor failed to address all of the *Albright* factors. Only a few of the factors were considered and the Chancellor acknowledges this fact in his *Judgment*. The *Judgment* states in part, "Due to the brevity of the proof and the absence of details on many of the factors, the Court summarizes its findings as follow: . . ." **See Exhibit "G"**. In spite of the lack of evidence the Chancellor made his ruling on the following factors:

1. late appearance of the father into the child's life (presumably this falls under the "other factors relevant to the issue of custody")
2. the relationship of the minor child with his sister (this also presumably falls under the "other factors relevant to the issue of custody")
3. stability of the home and employment
4. the minor child's school record
5. willingness and capacity to provide for the child
6. age and sex of the minor child
7. parenting skills; and
8. morals. **See Exhibit "G"**.

The Chancellor did not consider the following important factors: 1. which parent had the continuity of care for the child 2. the physical and mental health of each parent 3. the respective ages of the parents; and 4. the emotional ties of each parent to the child. The Chancellor's judgment was based solely upon the limited evidence that Appellee's attorney extracted at the hearing. The *Albright* decision demands that all the factors be considered when determining the best interests of the child, however that did not take place in the case *sub judice*. The Chancellor should have appointed a guardian *ad litem* to protect the interests of the minor child at the hearing or should have questioned the witnesses further himself to establish evidence for ruling on all of the *Albright* factors.

2. The Chancellor was clearly erroneous in his decision to modify child custody.

The first factor that the Chancellor found in favor of the Appellee was the "stability of the home and employment." **See Exhibit "D"**. This decision was reached presumably because the Appellee testified that he has a job and a 3 bedroom/2 bathroom home. **See Exhibit "C"**. However, Appellant testified that she also has a job and a 3 bedroom/ 1 bathroom home. **See Exhibit "C"**. This factor actually weighs in favor of the Appellant because the minor child has his own bedroom at the Appellant's house while he has to share a room at the Appellee's house. The second factor the Chancellor found in favor of the Appellee was the "poor school record of the child." **See Exhibit "D"**. The Appellant testified that the minor child was making A's, B's and C's on his report card. **See Exhibit "C"**. The Appellee countered this testimony with inadmissible hearsay evidence in the form of letters allegedly written by the minor child's school teachers. **See Exhibit "C"**. Apparently the Chancellor gave more weight to the inadmissible hearsay evidence presented by the Appellee than he did to the testimony of the Appellant. The Chancellor abused his discretion when admitting the hearsay evidence.

The third factor the Chancellor found in favor of the Appellee was the "willingness and capacity to provide for the child." **See Exhibit "D"**. This finding is inexplicable in that both parents testified that they desire to have custody of the minor child. **See Exhibit "C"**. However, on one hand the Appellee has previously shown either a lack of willingness and/or capacity to provide for the child when he either refused or failed to make the Court ordered child support payments and was in arrearage in his

child support payment in 2003. **See Exhibit "A"**. On the other hand the Appellant has clearly shown a willingness and capacity to provide for the child as she has willingly provided for and raised the minor child since his birth. The Chancellor was clearly erroneous and manifestly wrong in his decision regarding this factor. The fourth factor the Chancellor found in favor of the Appellee was the "age and sex of the child." **See Exhibit "D"**. The Chancellor does not elaborate on how he reached his decision on this factor and the evidence presented certainly does not support finding that the age and sex of the child to favor the Appellee. The fifth factor that the Chancellor found in favor of the Appellee was the "parenting skills." **See Exhibit "D"**. Again the Chancellor does not explain how he reached his decision on this factor and again the evidence presented does not support finding that the Appellee has better parenting skills than the Appellant. The evidence did, however, reveal that Appellant has more parenting experience than the Appellee as the Appellant has raised her twelve year old daughter with the minor child. **See Exhibit "C"**.

The sixth and final factor the Chancellor found in favor of the Appellee was the "morals factor." **See Exhibit "D"**. Both parents testified at the hearing that they regularly attended church. **See Exhibit "C"**. However, Appellee's testimony on this subject was impeached by his own pastor. Appellee testified under oath that he is a minister. **See Exhibit "C"**. However, Reverend Edwards took the stand and testified that Appellee is not a minister but is actually a "deacon trainee." **See Exhibit "C"**. The evidence presented failed to prove that either parent had moral superiority over the other. Still Appellee's testimony did reveal, to say the least, that he exaggerated his status at his

church when he testified under oath that he is a minister. **See Exhibit "C".**

In summary, the testimony presented at the hearing failed to establish that any of the *Albright* factors, that the Chancellor actually considered, favored the Appellee. The evidence really showed that the some of the factors favored the Appellant while the others favored neither party. As a result the Chancellor was clearly erroneous in his decision to modify child custody.

CONCLUSION

The above argument reveals two errors made by the Chancellor. First, the Chancellor made a decision to modify child custody without sufficient evidence to rule on all of the *Albright* factors. The Chancellor's *Judgment* acknowledges that he has insufficient evidence to rule on all of the *Albright* factors, but for some reason he chose to make a ruling on the limited evidence he heard at the hearing. Second, the Chancellor was clearly erroneous in his findings of fact in regard to the few *Albright* factors that he did consider. The evidence actually showed that some of the factors favored the Appellant while the others favored neither party. The Chancellor, nevertheless, found in favor of the Appellant, in some instances without giving an explanation for his finding and in other instances basing his findings on inadmissible evidence. The Chancellor's ruling to modify child custody was clearly erroneous on two grounds and his decision should be reversed with custody going back to the Appellant. In the alternative, the Chancellor's decision should be reversed and remanded for a new hearing so that evidence can be presented on all of the *Albright* factors before the Chancellor makes his decision.

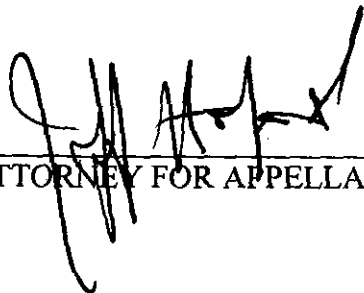
CERTIFICATE OF SERVICE

I, Ned "Tres" McDonald III, hereby certify that I have this day served a true and correct copy of the above and foregoing, via U.S. Mail, postage prepaid, to the following:

The Honorable Robert J. Lancaster
District 14 Chancery Judge
P.O. Box 884
Columbus, MS 39703-0884

Curtis H. Austin, Esq.
P.O. Box 296
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This the ____ day of June, 2007.



ATTORNEY FOR APPELLANT