

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH FIERRO THURMAN (formerly Johnson)

APPELLANT

VERSUS

DOCKET NO. 2007-CA-00713

GLEN P. JOHNSON


APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

Presented to the Court by:

Kelly Michael Rayburn
Counsel of Record for Appellant
P.O. Box 2566
Gulfport, MS 39505
(228) 539-2400 (ofc)
(228) 539-3130 (fax)



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH FIERRO THURMAN (formerly Johnson)

APPELLANT

VERSUS

DOCKET NO. 2007-CA-00713

GLEN P. JOHNSON

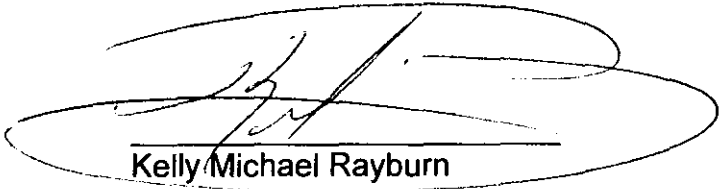
APPELLEE

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 possible disqualification or recusal.

- 1) Deborah Fierro Thurman (formerly Johnson), Appellant
- 2) Kelly Michael Rayburn
Counsel of Record for Appellant
- 3) Glen P. Johnson, Appellant
- 4) William E. Tisdale
Counsel of Record for Appellant
- 5) Hon. James Persons
Chancellor
Eighth Chancery Court District

This the 26th day of November 2007.



Kelly Michael Rayburn

TABLE OF CONTENTS

	Page
Certificate of Interested Persons.....	i
Table of Contents.....	ii
Table of Authorities.....	iii
Statement of the Issues.....	iv
Statement of the Case.....	v
Statement of the Facts.....	vii
Summary of the Argument.....	1
Argument.....	4
Conclusion.....	14
Certificate of Service.....	15

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Albright v. Albright</i> , 437 So.2d 1003,1005 (Miss. 1983).....	1,2,3,7,8,9,10,11,12,13
<i>Brekeen v. Brekeen</i> , 880 So.2d 280 (Miss. 2004).....	1,2,3,11,12
<i>Brock v. Brock</i> , 906 So.2d 879, 885-886 (Miss. App. 2005).....	10
<i>Carr v. Carr</i> , 480 So.2d 1120, 1123 (Miss. 1985).....	10,11
<i>Fulk v. Fulk</i> , 827 So. 2 nd 736 (Miss. App. 2002).....	10
<i>Hammett v. Woods</i> , 602 So.2d 825, 828 (Miss. 1992).....	10
<i>Hollon v. Hollon</i> , 784 So.2d 953, 949-950 (Miss. 2001).....	10
<i>Tedford v. Dempsey</i> , 437 So.2d 410, 417 (Miss. 1983).....	10

STATEMENT OF THE ISSUES

I.

WHETHER THE CHANCELLOR IMPROPERLY APPLIED THE ALBRIGHT FACTORS IN AWARDING PHYSICAL CUSTODY OF THE MINOR CHILD TO THE FATHER BY PLACING OVERWHELMING EMPHASIS ON MOTHER'S RELATIONSHIP WITH ANOTHER MAN

STATEMENT OF THE CASE
AND STATEMENT OF THE FACTS

I.

STATEMENT OF THE CASE

Glen P. Johnson filed his Complaint for Divorce on June 21, 2004 alleging the parties were entitled to a divorce on the grounds of Irreconcilable Differences. On July 12, 2004, Mr. Johnson filed a Petition for Temporary Custody, Support and Other Relief. On July 16, 2004, Deborah Fierro Johnson, now Deborah Thurman, (hereinafter the parties will be identified as "Deborah" and "Glen") filed her Answer to the Petition for Temporary Custody and Other Relief and Counter-Petition for Temporary Custody and Related Relief. An Answer to the Counter-Petition was filed by Glen on August 11, 2004.

Subsequently, on August 12, 2004 an Agreed Motion for Leave to Amend the Complaint for Divorce was filed. The Order allowing the Amended Complaint to be filed was entered by the Court on August 24, 2004. The Amended Complaint alleged that Glen was entitled to a divorce on the ground of Adultery, and further that he should be awarded the primary physical custody of the parties' only child, Tyler Johnson (hereinafter referred to as "Tyler"), born October 16, 1999, and further requested other relief as detailed therein. On April 7, 2005, Deborah filed her Answer to the Complaint for Divorce and her Counter-Complaint for Divorce, requesting among other relief, that she be awarded a divorce on the ground of Habitual Cruel and Inhuman Treatment, and that she be awarded the primary physical custody of Tyler.

On April 12, 2005 the first day of the trial of the case occurred on the respective pleadings filed by the parties. The trial could not conclude on that date and the matter was reset for the conclusion of the trial, and the Court reconvened on January 10, 2006 (as best as can be determined from the transcript) for the second day of the trial. The trial finally concluded the following day on January 11, 2006.

On July 25, 2005 an Agreed Temporary Judgment *nunc pro tunc* to November 23, 2004 was entered by the Court awarding the parties the joint temporary legal and physical custody of the minor child.

On August 18, 2006, the Chancellor rendered the Final Judgment of Divorce, which was filed on that date. The Final Judgment awarded the primary physical custody of Tyler to Glen, contingent upon the filing of the Guardian Ad Litem's report, and awarded to Deborah visitation with the minor child and ordered her to pay child support in the amount of \$277.00 per month.

Deborah filed her notice of substitution of counsel on August 25, 2006 and her Motion for New Trial, or in the Alternative for Reconsideration on that date as well.

A hearing on the Motion for New Trial was held on November 3, 2006. At the hearing, it was acknowledged that Deborah had married Michael Thurman on August 23, 2006. Subsequently, an Agreed Judgment was entered by the Court on November 14, 2006 announcing that the parties had agreed to settle all of the economic issues as addressed in the Final Judgment, and acknowledging the receipt of the Guardian Ad Litem's report dated October 27, 2006. The Agreed

Judgment reserved ruling on Deborah's motion to reconsider custody of the child and related issues.

A supplemental Order was entered on November 30, 2006 acknowledging the withdrawal by Deborah of the issue raised in her Motion for New Trial regarding the Court not awarding her a divorce on the ground of Habitual Cruel and Inhuman Treatment.

On March 30, 2007, the Chancellor rendered his Order denying the relief requested in Deborah's Motion for New Trial, or in the Alternative for Reconsideration.

On April 27, 2007 Deborah filed her Notice of Appeal.

II.

STATEMENT OF THE FACTS

Glen and Deborah married on April 27, 1997 in Alaska. At the time of the marriage Deborah had custody of her other two (2) children from a previous marriage. They moved to Biloxi, Mississippi and purchased a house in 1999. Glen is originally from Montana. TR at 6,19, and 68.

Glen and Deborah had one (1) child together, Tyler, born October 16, 1999, who is now 8 years of age. TR at 69. At the time of trial in April 2005, both Glen and Deborah were still residing in the Second Judicial District of Harrison County, Mississippi. Glen was a staff sergeant in the United States Air Force stationed at Keesler Air Force Base and Deborah was a dental assistant. TR at 12-13.

By the time of the second day of trial on January 10, 2006, Glen was serving a ten-month sentence of incarceration in the Keesler Air Force Base detention

facility that began in December 2005. TR at 203-204. Glen's testimony was that he was to receive a bad conduct discharge from the Air Force upon his release from confinement and that his Air Force career would be over. He was reduced in rank from E-5 to E-1. TR at 411. Glen had joined the Air Force in 1993. TR at 413, line 22. Glen admitted to another episode at Sears when he was alleged to have shoplifted and received a reprimand from the Air Force. TR at 465, lines 11-17. Deborah detailed items that she observed at their house that Glen had taken from the Air Force Base, in addition to the television that he was formally charged with stealing. TR at 264-266. Glen suffers from depression and takes regular medication for it. TR at 121-122. He describes his condition as hereditary. TR at 122.

The couple engaged in heated arguments almost daily throughout their 9 years of marriage. During January of 2003 both Glen and Deborah were arrested and charged with domestic violence. TR at 428; TR at 456. The charges were non-adjudicated upon completion of anger management classes and six (6) months probation. TR at 153.

Deborah testified that in addition to the verbal abuse upon her by Glen, she was also subjected to physical violence over 20 times during the 9 years of marriage. She testified to physical altercations from the first year of the marriage when she was thrown into a wall by Glen, to the later part of the marriage when Glen would stand over her yelling and would spit at her, forcing her to push him away. She specifically testified about Glen having pushed her down the stairs at

their house, resulting in numerous bruises. TR at 250. These bruises were witnessed by her friend Jennifer Skoros, who testified at trial. TR at 164-165. Jennifer is the mother of Joshua, who is Tyler's best friend. TR 170. Glen's only specific response to this allegation was that he didn't remember it happening. TR at 430, lines 25-28. According to Deborah, the verbal and physical violence lead to the separation of the parties in March of 2004. TR at 251. Glen admitted to hitting Deborah and being physical with her on occasion. TR at 104-105.

At the end of 2003 or beginning of 2004 Deborah began having a relationship with Michael ("Mike") Thurman. Deborah admitted this relationship in both her pleadings and her testimony, which was corroborated by the testimony of Mike Thurman. TR at 294. Although this was prior to Glen leaving for Iraq in March 2004, Deborah stated that Glen had already begun packing up his things in preparation of moving out. TR at 294, 296 at 130. This relationship with Mike continued through the time of trial. As reflected at the November 3, 2006 hearing on Deborah's Motion for New Trial, or in the Alternative for Reconsideration, Deborah and Mike were married on August 23, 2006 in Louisiana (Exhibit No. 2 to the November 3, 2006 hearing).

Glen was deployed to Iraq in 2004. He and Deborah decided to have Tyler live with Glen's parents in Montana while Glen was deployed. According to Deborah, Glen's parents wanted to visit with the child prior to Tyler starting school and Deborah agreed. TR at 313-314. On March 5, 2004, after Tyler had been transported to Montana and the night before he left for Iraq, he and

Deborah engaged in a screaming match. The parties agreed that the date of separation is March 6, 2004, the day Glen left the United States for Iraq. Glen returned from his tour of duty on June 17, 2004.

Beginning in March of 2004, Mike Thurman regularly spent the night with Deborah in the marital home. Her children from her previous marriage were present during Thurman's overnight visits. TR at 50. Mike testified, however, that during these times he would park his vehicle around the corner in order to keep his relationship with Deborah from the children. TR at 57. From March to June 2004 Deborah and Mike took trips to Pensacola, Fla, Washington, D.C., Nashville, TN and New Orleans, without the children. Mike testified that he drives Deborah's car and pays expenses at her home. Mike also testified that he and Deborah have a joint checking account and that he planned to make his relationship with Deborah permanent (as did Deborah in her testimony). Glen did not voice an object to Mike living with Deborah, even when Tyler was with her. TR at 133.

Glen did not know about Deborah's relationship with Mike prior to leaving for Iraq. During his tour of duty, Deborah informed Glen for the first time that she had met someone else. TR at 356-357. Immediately prior to Glen's return, Deborah changed the locks on the marital home and denied him access to the home. TR at 251. According to the testimony, Deborah changed the locks because she was afraid of Glen. TR at 283.

After his return, Glen stayed with various female friends, including an Air Force Captain, Catherine Negaard, but denied a sexual relationship. TR at 403, lines 18-20, and 230-231 (Captain Catherine Negaard); TR at 404-405 (Jennifer Hickman); and TR at 406 (Barbara Jean Marks). However, his testimony was contradicted by the Captain herself, who asserted her Fifth Amendment right against self-incrimination when asked the question "Have you maintained an intimate sexual relationship with him." TR at page 400, lines 25-26. The Captain, a nurse at the same hospital where Glen worked, further asserted her Fifth Amendment rights in response to whether she had spent the night at Glen's house or apartment and to whether Tyler was present. TR at 402, lines 22-26. Glen admitted that he did stay over at her house on one occasion and that she stayed at his house in 2005 for a "couple of nights" following Hurricane Katrina. TR at 410, lines 22-28. Glen admitted that Tyler was there when this occurred. TR at 446. Glen admitted to staying with Barbara Jean Marks for two months and sleeping in the same bed with her most of the nights he was there. TR at 445; TR at 145.

On June 19, 2004 Glen obtained access to the marital home when Deborah was not there. Once inside he saw Mike Thurman's uniform folded on a counter, notes from Mike Thurman to Deborah and photographs of Mike Thurman and Deborah. He also found a wooden marijuana pipe while searching Deborah's jewelry box. TR at 51. The pipe belonged to Deborah's sister. Deborah testified that her sister was visiting with her just before Glen left for Iraq and was there for

a day after he left. She discovered the pipe, which contained no marijuana, and placed it in her jewelry box. TR at 319-320. Deborah does not take drugs. TR at 50-51. Glen immediately contacted the Biloxi Police Department and turned the pipe over to the police. According to Glen, he received numerous threats from Mike Thurman after he returned stateside. TR at 87.

Glen filed for divorce alleging irreconcilable differences on June 21, 2004, four (4) days following his return from Iraq. Glen then went to Montana to retrieve Tyler, but did not bring him back to Mississippi for at least a week, and once in Mississippi, Glen did not inform Deborah that Tyler was back for a couple of weeks. TR at 254-256. During this time Glen and Tyler continued to reside with friends, including Barbara Jean Marks. At the time of trial a military investigation regarding Glen's fraternization with Captain Negaard was in progress. TR at 226.

Glen and Deborah talked and determined that their marriage was over. TR at 115, lines 12-27. Following Hurricane Katrina, Mike Thurman moved into the home with Deborah and her children. Deborah testified that this was primarily for financial reasons following Katrina and further that Mike had lost his apartment during the storm. TR at 280. Glen paid the mortgage on the home through July of 2004, and thereafter, Deborah made the payments. TR at 209-210.

The Court found that Glen met his burden of proving adultery by clear and convincing evidence. Deborah admitted she committed adultery in her testimony.

The Court heard testimony from several witnesses, including the parties themselves, that Glen and Deborah engaged in shouting arguments. Neighbors

witnessed several such arguments. Deborah testified that Glen physically harmed her on more than 20 occasions and would spit in her face. TR at 243, 246. Glen testified that he and Deborah were physically abusive to one another over the course of the marriage, and both were required to attend anger management classes following their arrest for domestic violence. TR at 107.

The Court found that the conduct of Glen alone did not constitute habitual cruel and inhuman treatment and that Deborah failed to meet her burden of proving her grounds for divorce.

Glen testified that if he were awarded custody of Tyler that he would move back to Montana. TR at 223; TR at 441-442. Although, at the time of the entry of the Final Judgment of Divorce Glen was still residing on the Gulf Coast, following the exercise of Deborah's summer visitation with Tyler at her home in 2007, Glen in fact moved back to Montana and took Tyler with him.

SUMMARY OF THE ARGUMENT

I.

WHETHER THE CHANCELLOR IMPROPERLY APPLIED THE ALBRIGHT FACTORS IN AWARDING PHYSICAL CUSTODY OF THE MINOR CHILD TO THE FATHER BY PLACING OVERWHELMING EMPHASIS ON MOTHER'S RELATIONSHIP WITH ANOTHER MAN

The fact that the Court placed overwhelming emphasis on Deborah's relationship, but not on Glen's relationships, and his other immoral and criminal conduct, constitutes reversible error. Indeed, if the chancellor had ruled on the custody determination following the trial, keeping his custody decision the same, he would have awarded the child to a man who was in the first month of a ten month period of incarceration. The absurdity of that event is self-evident.

In *Brekeen v. Brekeen*, 880 So.2d 280 (Miss. 2004), the Supreme Court addressed the issue of a chancellor placing too much weight on one factor, and in doing so, impermissibly sanctioned the mother because of her adultery. In that case, the chancellor awarded a divorce to the husband on the ground of adultery and awarded the physical custody of the parties' minor child to him. *Id.* at 281.

In analyzing the *Albright* factors, the chancellor in *Brekeen* determined that, "Barbara Ann Brekeen has used very poor judgment in her personal life in that she has clearly engaged in an extra-marital affair with an individual she met while working with the Town of Tishomingo." *Id.* at 282. The chancellor, after reciting the facts he considered under the "moral fitness" factor, stated that "call this Court to have grave and serious concerns about her moral fitness for custody of

the minor child.” *Id.* The chancellor considered this conduct under Factor 11 (Other factors relevant to the parent-child relationship) as well. *Id.* at 283.

In *Brekeen*, the chancellor found that that the mother had good parenting skills on the one hand, but on the other hand found doubted “her ability to serve as the primary custodian of her minor daughter.” *Id.* at 286.

The Supreme Court in *Brekeen* reversed the chancellor’s decision on the award of physical custody to the father.

After a thorough review of the record, we find without a doubt that the chancellor relied heavily on the fact the [sic] Barbara had an affair, thus placing too much weight on one *Albright* factor. From his consideration of the *Albright* factors, the chancellor found two in favor of William (moral fitness and other relevant factors) and one in favor of Barbara (continuity of care prior to the separation). The remaining factors were found to be neutral.

Id. at 287.

The Court further stated that,

We must remember what this Court stated in *Albright*, ‘[m]arital fault should not be used as a sanction in custody awards.’ (citing *Albright*, 437 So.2d at 1005). In today’s case, the chancellor granted William a divorce from Barbara on the ground of adultery. The chancellor in this case indeed ‘sanctioned’ Barbara by denial of custody of her daughter because of her marital fault-adultery. Of the various *Albright* factors considered by the chancellor, a reading of the record, including the chancellor’s detailed 13-page opinion and judgment, can leave no doubt that Barbara’s adultery, whether it be categorized as ‘moral fitness’ or the catch-all ‘other factors’ under *Albright*, caused Barbara to be denied custody of her minor daughter.

Id.

The facts of the present case are even stronger in favor of reversal. The chancellor found that Deborah and Glen demonstrated adequate parenting skills, **weighed more factors in Deborah’s favor than in Glen’s favor**, and still

awarded physical custody to Glen. The chancellor specifically pointed out Deborah's adultery in two of the factors (as stated above) and opined that her behavior "concern the Court as it relates to the impact such behavior will have on Tyler." Yet, all of the conduct of Glen, his incarceration, his history of theft and violence, his staying with other women (one of whom, a superior officer in his command, plead the Fifth Amendment when asked about having sex with Glen), and his odd parenting conduct with regard to Tyler, did not appear to concern the Court as it relates to the impact such behavior will have on Tyler.

ARGUMENT

I.

WHETHER THE CHANCELLOR IMPROPERLY APPLIED THE ALBRIGHT FACTORS IN AWARDING PHYSICAL CUSTODY OF THE MINOR CHILD TO THE FATHER BY PLACING OVERWHELMING EMPHASIS ON MOTHER'S RELATIONSHIP WITH ANOTHER MAN

The Chancellor's findings with regard to the *Albright* factors are found in pages 8-12 of the Judgment of Divorce. RE at 18-22. They are reprinted below:

1. Age, health, sex of the child:

Tyler is a six (6) year old male who is in good health. **This factor favors neither party.**

2. Continuity of care prior to the separation:

According to all witnesses, both Glen and Deborah cared for Tyler on a daily basis since he was born. **The Court finds that this factor favors neither party.**

3. Parenting skills and willingness and capacity to provide primary child care:

Both parents have the requisite parenting skills and capacity to provide for the primary care of Tyler. Testimony indicated that prior to the separation of the parties they shared equally in the care of Tyler. Glen would cook most of the family meals as Deborah testified she does not like to cook, while Deborah did most of the housecleaning.

Glen attended a parenting class after returning from Iraq and obtained a certificate of completion. Prior to going on his tour of duty, Glen suggested that Tyler go live with his family in Montana during his deployment, and Deborah readily agreed. Glen's family resides in Montana and Deborah's family resides on the East Coast of the United States; neither party have family on the Mississippi Gulf Coast.

Deborah has two (2) children from a prior marriage, a 13 year old female and a 10 year old male, with whom Tyler has apparently bonded. At the time of

trial, both of Deborah's children from a prior marriage were in Arizona with their father, with plans to return once this divorce action is ended.

Prior to Glen's deployment Deborah would go out partying into the wee hours of the morning with her girlfriends on the week-end leaving all her children in Glen's care. Testimony indicated that this behavior stopped in 2004.

Glen pleaded guilty to crimes committed while in the military and received a sentence of 10 months incarceration. At the time of trial he had served one (1) month. As a result of this plea, Glen stopped receiving pay, he will receive a bad conduct discharge will lose all his military retirement. During his incarceration he has no means to care for Tyler other than to send Tyler to Montana to be with his parents.

Following the parties separation they worked out a visitation plan and shared custody of Tyler. Since Glen was incarcerated Deborah has had full custody and care of Tyler.

Deborah testified that after the divorce she plans on remaining on the Mississippi Gulf Coast and, if she obtains custody of Tyler, would place him in public schools. Glen testified that after the divorce and his release from incarceration he plans on moving to Missoula, Montana and working in the construction business and, should he obtain custody of Tyler, would place him in school in Montana.

This factor weighs in favor of neither party, the Court finding that both have demonstrated that they possess adequate parenting skills.

4. Employment of the parent and responsibilities of that employment:

Prior to and during the marriage Deborah worked as a dental assistant and Glen was in the United States Air Force. Glen's military assignment, prior to his incarceration, was as a carpenter at the Keesler Medical Center. During this time Tyler was in nursery care at Keesler Air Force Base.

Hurricane Katrina hit the Mississippi Gulf Coast on August 29, 2006. Deborah was out of work for 2 months and received unemployment compensation during this period. Deborah's paramour, Mike Thurman, also moved in with Deborah following Hurricane Katrina. At the time of trial Deborah had returned to her job of 5 years as a dental assistant for Dr. James Alien, and Glen was incarcerated, but testified that upon his discharge from the military he will work as a carpenter in his home state of Montana.

Deborah works four (4) days a week, Monday through Thursday, from 8 a.m. to 5 p.m. Tyler attends Biloxi Public School kindergarten at Jeff Davis

Elementary. The Court received no testimony regarding how Deborah is managing as a single parent. **This factor slightly weighs in favor of Deborah.**

5. Physical and mental health and age of the parents:

Glen is 35 years old. His health appears to be good, although he comes from a family with a story of depression for which he has taken medication for approximately nine (9) years. Glen testified that he currently takes the anti-depressant Provocal 150mg once per day and has taken this for approximately one (1) year, and Zoloft. Prior to that, he took Prozac for (5) years and Wellbutrin for six (6) months. Deborah is 33 years of age. In 2001 she was diagnosed with multiple sclerosis for which she received medication. Deborah testified that the medication did not make her feel right, so she stopped taking it and, as of the time of trial, was still medication free. According to Deborah, her last attack occurred in June of 2001 and she has remained symptom free since that time. **This factor slightly favors Deborah.**

6. Emotional ties of the parent and the child:

Both Glen and Deborah emotionally tied to Tyler and Tyler appears to love and have emotional ties to both of his parents. During the period of separation and prior to Glen's incarceration, the parties worked well together to provide each other plentiful and quality time with their child, for which they are to be commended. **This factor favors neither party.**

7. Moral fitness of the parents:

Both Glen and Deborah have moral issues and neither is in a position to be critical of the other. Glen is a convicted criminal and Deborah is an admitted adulteress. Glen's legal issues arise from the theft of a television set from Keesler Air Force Base which was placed in the marital home. The Court finds that Deborah was aware of the fact that the television set was stolen and raised no objection to Glen. However, the Court finds that Deborah has deliberately exposed her children to her immoral activity and has done so in defiance of an Order entered by this Court to which she agreed. **Accordingly, this factor favors Glen.**

8. The home, school, and community record of the child:

Tyler is young, but appears to be doing well in school. **This factor favors neither party.**

9. The preference of the child at the age sufficient by law to express a preference:

Tyler is six (6) years old and legally not old enough to state a preference.

10. Stability of home and employment of each parent:

At the present time only Deborah has what could be described as a stable home, even though her paramour lives with her despite the Agreed Temporary Judgment prohibiting such behavior. Deborah's behavior of opening living with a man while still married to another and opening defying and ignoring the Orders of this Court, even the Order to which she agreed, concern the Court as it relates to the impact such behavior will have on Tyler. As of the date hereof Glen term of incarceration has ended and the Court is not aware of his home or where he resides. The employment of each parent thoroughly discussed in factor number "4" is incorporated into this factor.

Based upon the foregoing facts and findings, and after having fully considered the *Albright* factors, the Court finds that at the present time Glen should be awarded the primary physical custody of the minor child of the parties, with Deborah being granted visitation as hereinafter set forth. The change in primary physical custody of the minor child to Glen shall take effect upon further order of the Court following completion and the Court's acceptance of the home study of Glen's home by the Harrison County Chancery Court Social Worker, Freida Kaletsch.

RE at 18-22. (Underlined and Bold Emphasis Supplied).

Under Nos. 7 (Moral Fitness) and 10 (Stability of home and employment of each parent) above, the Chancellor's comments make it obvious that Deborah's relationship with Mike was an overriding factor in the Chancellor's decision to award physical custody to Glen. The chancellor discounted several important facts: particularly 1) Glen's history of theft, including the fact that he was incarcerated during the trial, 2) his cohabitation with other women in the presence of Tyler, 3) the fact that there was no proof offered at trial whatsoever that Deborah's relationship with Mike had an adverse impact on Tyler; 4) Glen's testimony that he would move with the child to Montana if he were awarded custody, 5) Glen's odd parenting behavior of allowing the child to sleep in his

clothes, bathing and showering with him at an age where it appeared inappropriate, sleeping with him, as well as carrying him constantly; and 6) Deborah's continuity of care from December 2005 until March 2007 in which she was the primary custodian. The chancellor did not take into consideration at all that Tyler had lived solely with Deborah during this period, and that Glen wholly failed to provide any support for the child during this period of time.

Indeed, the chancellor weighed more of the *Albright* factors in Deborah's favor (Nos. 4 and 5) than Glen's favor (No. 7), finding the remaining factors neutral. The Court stated in No. 10 (Stability of Home and Employment of Each Parent) that "At the present time only Deborah has what could be described as a stable home. . . ."

At the time of trial Glen was unemployed and incarcerated and Deborah had the same job for many years. Glen's immediate past employment ended in disaster as he was reduced in rank, incarcerated, and was to be given a less than honorable discharge. Although the chancellor did not specifically state which parent factor No. 10 favored, it is clear that it in no way could have favored Glen, and could have only favored Deborah.

Although the determination of custody is not a strict formula whereby the parent with the most factors in his or her favor always wins, it is an analysis that must be made so that the reason for the ultimate custody determination will be known to the parties. This leads to the question, how then could the chancellor determine that Glen would be awarded the physical custody of Tyler in light of the Court's *Albright* analysis?

The chancellor makes plain in Nos. 7 and 10, that Deborah's adultery and her living with Mike following the entry of a temporary order prohibiting such conduct was the determining factor. As stated in No. 10 "Deborah's behavior of opening living with a man while still married to another and opening defying and ignoring the Orders of this Court, even the Order to which she agreed, concern the Court as it relates to the impact such behavior will have on Tyler." RE at 21-22. As the Court stated in No. 7, "However, the Court finds that Deborah has deliberately exposed her children to her immoral activity and has done so in defiance of an Order entered by this Court to which she agreed." RE at 21. No finding of contempt was made by the chancellor for any perceived violation of the prior order, and Deborah testified about the circumstances following Hurricane Katrina that necessitated her now husband, Mike, living with her.

As stated in the past decisions of the Supreme 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). *Albright* set forth the guidelines that judges must follow in making a child custody determination.

These factors include:

- 1) age, health and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship.

Id. at 1005. Marital fault should not be used as a sanction in the custody decision, nor should differences in religion, personal values and lifestyles be the sole basis for custody decisions. *Id.* (emphasis supplied).

The chancellor's findings will not be reversed as long as they are supported by substantial evidence in the record. *Tedford v. Dempsey*, 437 So.2d 410, 417 (Miss. 1983). However, the chancellor will be reversed if he is "manifestly in error in his finding of fact or has abused his discretion." *Hammett v. Woods*, 602 So.2d 825, 828 (Miss. 1992). If the chancellor places too much weight under the "moral fitness" factor based upon an affair, the decision must be reversed. *Hollon v. Hollon*, 784 So.2d 953, 949-950 (Miss. 2001)(the chancellor placed too much weight on the mother's homosexual affair, resulting in a reversal of the chancellor's custody determination); *Fulk v. Fulk*, 827 So. 2nd 736 (Miss. App. 2002)(chancellor placed too much emphasis on mother's affair in light of the father's own extra-marital conduct and reversed the custody determination); and see, *Brock v. Brock*, 906 So.2d 879, 885-886 (Miss. App. 2005)(in upholding award of custody to mother, the chancellor's findings that the mother's adultery did not affect her parental responsibilities was supported by the evidence).

As stated previously, "Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, **but on the other hand, may have no effect.**" *Carr v. Carr*, 480 So.2d 1120, 1123 (Miss. 1985)(emphasis supplied).

In the present case, the chancellor made no finding as to whether Deborah's relationship with Mike, or Glen's relationship with the three women for that matter, had an impact on Tyler. The fact that the Court placed overwhelming

emphasis on Deborah's relationship, but not on Glen's relationships, and his other immoral and criminal conduct, constitutes reversible error. Indeed, if the chancellor had ruled on the custody determination following the trial, keeping his custody decision the same, he would have awarded the child to a man who was in the first month of a ten month period of incarceration. The absurdity of that event is self-evident.

In *Brekeen v. Brekeen*, 880 So.2d 280 (Miss. 2004), the Supreme Court addressed the issue of a chancellor placing too much weight on one factor, and in doing so, impermissibly sanctioned the mother because of her adultery. In that case, the chancellor awarded a divorce to the husband on the ground of adultery and awarded the physical custody of the parties' minor child to him. *Id.* at 281.

In analyzing the *Albright* factors, the chancellor in *Brekeen* determined that, "Barbara Ann Brekeen has used very poor judgment in her personal life in that she has clearly engaged in an extra-marital affair with an individual she met while working with the Town of Tishomingo." *Id.* at 282. The chancellor, after reciting the facts he considered under the "moral fitness" factor, stated that "call this Court to have grave and serious concerns about her moral fitness for custody of the minor child." *Id.* The chancellor considered this conduct under Factor 11 (Other factors relevant to the parent-child relationship) as well. *Id.* at 283.

In *Brekeen*, the chancellor found that that the mother had good parenting skills on the one hand, but on the other hand doubted "her ability to serve as the primary custodian of her minor daughter." *Id.* at 286.

The Supreme Court in *Brekeen* reversed the chancellor's decision on the award of physical custody to the father.

After a thorough review of the record, we find without a doubt that the chancellor relied heavily on the fact the [sic] Barbara had an affair, thus placing too much weight on one *Albright* factor. From his consideration of the *Albright* factors, the chancellor found two in favor of William (moral fitness and other relevant factors) and one in favor of Barbara (continuity of care prior to the separation). The remaining factors were found to be neutral.

Id. at 287.

The Court further stated that,

We must remember what this Court stated in *Albright*, '[m]arital fault should not be used as a sanction in custody awards.' (citing *Albright*, 437 So.2d at 1005). In today's case, the chancellor granted William a divorce from Barbara on the ground of adultery. The chancellor in this case indeed 'sanctioned' Barbara by denial of custody of her daughter because of her marital fault-adultery. Of the various *Albright* factors considered by the chancellor, a reading of the record, including the chancellor's detailed 13-page opinion and judgment, can leave no doubt that Barbara's adultery, whether it be categorized as 'moral fitness' or the catch-all 'other factors' under *Albright*, caused Barbara to be denied custody of her minor daughter.

Id.

The facts of the present case are even stronger in favor of reversal. The chancellor found that Deborah and Glen demonstrated adequate parenting skills, **weighed more factors in Deborah's favor than in Glen's favor**, and still awarded physical custody to Glen. The chancellor specifically pointed out Deborah's adultery in two of the factors as stated above and opined that her behavior "concern the Court as it relates to the impact such behavior will have on Tyler." Yet, all of the conduct of Glen, his incarceration, his history of theft, his staying with other women (one of whom, a superior officer in his command, plead

the Fifth Amendment when asked about having sex with Glen), did not appear to concern the Court as it relates to the impact such behavior will have on Tyler.

Had the chancellor ruled promptly upon the close of the evidence, he would have had no choice but to award custody to Deborah. In any event, to place such overwhelming emphasis on Deborah's relationship with Mike, one in which she later ratified by marrying him, clearly suggests that she was being punished for her conduct, regardless of whether there was any negative impact on Tyler.

Furthermore, the chancellor failed to consider, or seriously discounted, other important factors in his *Albright* analysis: 1) Glen's history of theft (TR at 368), including the fact that he was incarcerated during the trial, 2) his cohabitation with other women in the presence of Tyler, 3) the fact that there was no proof offered at trial whatsoever that Deborah's relationship with Mike had an adverse impact on Tyler; 4) Glen's testimony that he would move with the child to Montana if he were awarded custody (which in fact did occur) in spite of the fact that the child had lived in the Second Judicial District of Harrison County all of his life with the exception of the period of time that he stayed with Glen's parents, 5) Glen's odd parenting behavior of allowing the child to sleep in his clothes, sleeping, bathing and showering with him at an age where it appears inappropriate, as well as carrying him constantly (TR at 80, 117, 237, and 300); and 6) Deborah's continuity of care following the separation, in particular from December 2005 until March 2007 in which she was the primary custodian.

The Court did not take into consideration at all that Tyler had lived solely with Deborah during this period, and that Glen wholly failed to provide any support for the child during this period of time.

Frankly, it is difficult to understand how the decision to award Glen the custody of Tyler could be made in light of the totality of the circumstances in this case. Punishing the mother had the unfortunate impact of punishing the child, and removing the child over 2000 miles away from his home and friends. I cannot see how this was in Tyler's best interests.

IV.

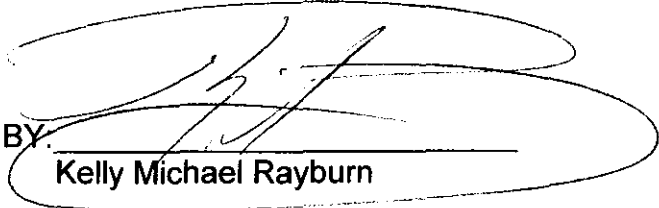
CONCLUSION

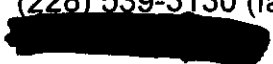
For the reasons stated above, this Court should reverse the chancellor's award of physical custody to the father, and return the case to the chancellor for further findings consistent with this Court's decision, or simply render a decision based upon the facts presented at trial, and award the physical custody of the minor child to the child's mother.

RESPECTFULLY SUBMITTED, on this 26th day of November 2007.

DEBORAH FIERRO THURMAN

BY:


Kelly Michael Rayburn

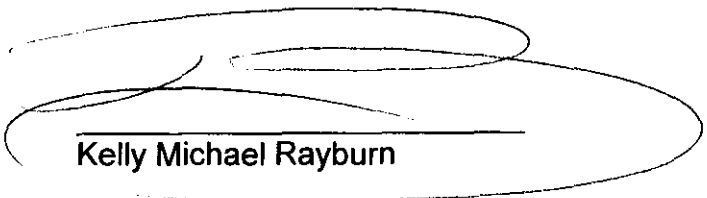
Counsel of Record for Appellant
P.O. Box 2566
Gulfport, MS 39505
(228) 539-2400 (ofc)
(228) 539-3130 (fax)


CERTIFICATE OF SERVICE

I, Kelly Michael Rayburn, counsel of record for the Appellant herein, do certify that I have this day mailed by United States Mail with postage prepaid to the Clerk of this Court the original and three copies of the Brief of Appellant, along with an electronic disk containing the Brief of Appellant; and further certify that I have this day mailed by United States Mail with postage prepaid a true and correct copy of the above and foregoing Brief of Appellant to the following persons at their regular business mailing addresses:

- 1) Hon. James Persons, Chancellor
Post Office Box 457
Gulfport, Mississippi 39502
- 2) William E. Tisdale
Counsel of Record for Appellee
P.O. Box 548
Biloxi, MS 39533-0548

So certified on this 26th day of November 2007.



Kelly Michael Rayburn