

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AMANDA CALDWELL McMILLAN WOODHAM

APPELLANT

Versus

NO. 2007-TS-01940

RICHARD BLANT WOODHAM, JR.

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 Judiciary may evaluate possible disqualifications or recusal.

1. Richard Blant Woodham, Appellee
2. Thomas L. Tullos, Attorney for Appellee
3. Amanda Caldwell McMillan Woodham, Appellant
4. Robert M. Logan, Attorney for Appellant
5. Honorable Janace Harvey- Goree, Special Chancellor



THOMAS L. TULLUS

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STATEMENT OF THE CASE

Proceedings in The Lower Court

This case commenced on May 17, 2006, when Richard Woodham (Richie) confirmed Amanda Woodham's (Amanda) uncondoned adultery with Ashley Thrash. Thereafter, on May 24, 2006, Richie filed his complaint for divorce against Amanda on the grounds of uncondoned adultery, and requested a divorce, custody of Rachel (their child) and an equitable division of the marital assets.

Amanda filed an answer and a counter-claim for divorce on the grounds of habitual cruel and inhuman treatment. She prayed for a divorce, custody of Rachel, and an equitable division of the marital assets.

Subsequently, on May 26, 2006, a temporary order was entered. The temporary order granted joint temporary custody of the child to both parents

At trial Richie went forward with his claim of adultery. Amanda dismissed her claim of cruelty. The parties agreed to a division of the marital assets. The only issues tried were those of Amanda's adultery and custody of Rachel.

On August 8, 2006, the chancellor rendered her Findings of Fact and Conclusions of Law. She granted a divorce to Richie on the grounds of uncondoned adultery and awarded him primary custody of Rachel. On September 5, 2006, the chancellor rendered an Amended Findings of Fact and Conclusions of Law whereby she made minor modifications to Amanda's visitation schedule with Rachel.

A Final Judgment of Divorce was rendered by the Court on September 6, 2006.

Not happy with the lower Court's ruling, Amanda has prosecuted her appeal to this Court.

Facts

Richie and Amanda were married on September 21, 1996. After seven years of marriage, Rachel was born on June 12, 2003. Six weeks or so after Rachel's birth, Amanda returned to work. (Tr.40,184) At that time Richie's grandmother, Mrs. Ruth Woodham (Miss Ruth) started keeping Rachel while Richie and Amanda were at work. (Tr. 30,40,184,185,432)

Miss Ruth has kept Rachel from 6:00 a.m., 7:00 a.m. until 4:00 p.m., five days per week, and has continued to do so until the present time. (Tr.41,185,430,433,450).

After Rachel was born, Amanda would get up early to go to work. Richie would get Rachel up, feed her, and carry her to Miss Ruth. (Tr. 30, 450). Richie has devoted practically all of his free time to Rachel. He has cooked for her, changed her diapers, read to her, played games with her, carried her fishing and to church. (Tr.30, 31, 32, 33, 34, 35, 194, 195, 196, 211, 212, 229, 231, 232)

Miss Ruth fixes Rachel breakfast, reads to her, has taught the ABC's to her, played games with her, taught her how to write her name, how to count and has had a tremendous influence upon her young life in a very positive fashion. (Tr.40, 41, 42, 43, 44, 185, 186, 187, 189, 190, 188,335, 336, 337, 340, 341). Not only has Miss Ruth had the child during the week, but on Saturdays Amanda would carry Rachel to Miss Ruth's home if Amanda wanted to clean her home or if she wanted to sleep late. (Tr. 185, 337, 450).

Louise Crenshaw (Louise) is Richie's mother. Louise has played a very substantial part in Rachel's young life. Rachel has spent many nights with Louise. On Wednesday nights Louise carries Rachel to church for Mission Friends. She has carried Rachel to church on Sundays. Amanda has called upon Louise on numerous occasions to keep Rachel so that she could take a bubble bath and enjoy a six-pack of beer. (Tr. 229, 230, 231, 236).

Richard Woodham is Richie's father. He and his fiancé, Kaye Moore, have a close relationship with Rachel. On every Friday afternoon Miss Ruth goes to the beauty shop. Richard and Kaye pick Rachel up and keep her the rest of the day. Rachel has stayed with them on many other occasions. (Tr.219).

Richie works for the Kansas City Railroad. Because of the nature of his work, Richie sometimes has to go into work early and, at times, works late. But he has at least two days off every week, and has other extended periods of time off from work. Because of his work schedule, Richie is able to spend a very considerable amount of time with Rachel. (Tr.362, 363, 364, 365, 366, 367).

In April, May, 2005, Amanda started flirting with John Ashley Thrash. Both worked at the La-Z-Boy plant in Newton. This relationship continued until October, 2005, when Amanda invited Mr. Thrash to pay a late night visit to her home. Richie was at work. Mr. Thrash met Amanda at her home, and they had sex in Amanda's and Richie's bed. (Tr. 7, 8, 9, 10).

Mr. Thrash continued to visit Amanda at her home, and they continued to have sexual relations. In March, 2006, Amanda moved out of the marital home and moved into an apartment in Newton. (Tr. 11,12,13,14).

During the week Mr. Thrash would visit Amanda in her apartment two or three times per week. They would watch television, drink beer, and have sex. Unfortunately, Rachel was present on some occasions while this went on. On one occasion Rachel went into Amanda's bedroom and crawled into bed with Amanda. Both Mr. Thrash and Amanda were in a state of undress. Although the evidence is in conflict, it is believed that Rachel saw Mr. Thrash in the bed. (Tr. 11,12,13,14,423)

During the weekends, Richie would stay in the apartment with Amanda. They also had sexual relations. Amanda and Richie even discussed having another child. (Tr. 28, 404,405,406,413).

This matter came to a head on May 17, 2006. On that occasion Richie, his dad, Richie's brother, and Ron Davis went to Amanda's apartment. Richie knocked on the door and called for her to let him in. She did. Richie and his witnesses went into the apartment. Amanda only had on a tee shirt and no panties. Mr. Thrash was found cowering in a closet wearing only a tee shirt.(Tr. 16,17,24,25,26,27).

Rachel was not in the apartment on this occasion. On this night, like many others, she was in the care of her paternal grandmother, Louise. (Tr. 229, 230, 436)

The parties finally separated on that occasion and did not cohabit thereafter.

SUMMARY OF THE ARGUMENT

1.

The court's award of the custody of the minor child to the father did not constitute a penalty to the mother and was based upon the facts and the law.

The law is clear that a parent should not lose custody of a child merely because the parent committed a marital infidelity. However, marital infidelity is a factor to be considered and how it affects the parent's ability to effectively parent the child. See: Mabus v. Mabus, 890 So. 2d. 806, 817-818 (para 46) (Miss. 2003).

The lower court did not punish Amanda because of her adultery. However, the court properly considered this issue along with the other Albright factors. The court recognized that Amanda's adultery had contributed to the child being removed from the marital domicile, and being placed with the paternal grandmother.

2.

The child's best interest was served by granting the child's primary physical and legal custody to her father.

The Chancellor analyzed the facts as presented to her and properly applied the law to the facts. The lower court has great discretion and latitude in making her decision in regards to these issues. The Chancellor did not err.

3.

The Chancellor properly applied the Albright factors.

The Chancellor went into great detail in analyzing the Albright factors. Five pages of her opinion were spent on these factors. Each applicable factor was considered in detail. The Chancellor did not err.

ARGUMENT

STANDARD OF REVIEW

This Court's standard of review in domestic relations cases is established and clear. Child custody matters fall within the sound discretion of the chancellor. Sturgis v. Sturgis, 792 So.2d. 1020, 1023 (para 12)(Miss. Ct. App. 2001). Therefore, a chancellor's ruling will not be disturbed unless the appellate court finds the decision was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Devito v. Devito, 967 So. 2d. 74, 75(para.1)(Miss. Ct. App. 2007); Cooper v. Ingram, 814 So. 2d. 166, 167(para 2)(Miss. Ct. App. 2002).

Further, the appellate court will not overturn a chancellor's decision if there is substantial credible evidence in the record to support his or her findings of fact. Smith v. Jones, 654 So.2d. 480, 485(Miss. 1985); Copeland v. Copeland, 904 So. 2d 1066, 1074(para 30)(Miss. 2004). "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.'" Ash v. Ash, 622 So. 2d. 1264, 1266 (Miss. 1993) (quoting Yates v. Yates, 284 So. 2d. 46, 47(Miss. 1973)). "Unless the evidence demands a finding contrary to the chancellor's decision, this Court will not disturb a custody ruling. Phillips v. Phillips, 555 So. 2d. 698, 700(Miss. 1989)." Copeland v. Copeland, 904 So. 2d 1066, 1074(para 30)(Miss. 2004).

ISSUE I

THE LOWER COURT DID NOT PUNISH AMANDA BECAUSE OF HER ADULTERY

The lower court did not punish Amanda because of her adulterous affair. However,

Amanda's adultery was a factor considered in awarding custody of Rachel. See: Mabus v. Mabus, 890 So. 2d. 806, 817-818 (para 46)(Miss. 2003). In Brock v. Brock, 906 So. 2d. 879, 886 (para 38)(Miss Ct. App. 2005), the Court of Appeals wrote that "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. The trial court should consider this factor with all others when making original custody determinations."

The chancellor in the case at bar did not give undue consideration to Amanda's adultery. The chancellor devoted over one-half of her opinion to a discussion of the Albright factors. The chancellor went into great detail in regards to each applicable factor. (R.E. 35-40)

In summary the chancellor ruled in Richie's favor because (1) Richie demonstrated a desire to provide Rachel's primary care, (2) Amanda showed poor judgment in mixing beer with the drug, Lexapro, (3) Richie's family is very close to Rachel and has given the child much attention, (4) Richie's grandmother has been a tremendous, positive influence on Rachel's young life, (5) Amanda has assumed a new life, new friends, and a new environment, and (6) Richie has maintained a stable life and stable atmosphere for Rachel. (R.E. 35-40).

It was the totality of the Albright factors which led the chancellor to rule for Richie, not a desire to punish or penalize Amanda.

Amanda cited Webb v. Webb, 974 So.2d. 274 (Miss. App. 2008) and Brekeen v. Brekeen, 880 So. 2d. 280 (Miss. 2004) as her authority in regards to this issue. However, neither case supports her arguments. In Webb the chancellor was extremely critical of the wife because of her adulterous affair. He made several derogatory comments during the trial which were inappropriate and unnecessary in his analysis of the Albright factors. Pg 280. However, in a concurring opinion Justice Carlton wrote as follows:

... In reviewing the entirety of the chancellor's analysis regarding the Albright factors and the evidence in support thereof, I cannot say that he erred. As the majority noted, our standard of review is limited to determining whether the chancellor abused his discretion, and unless he so abused his discretion as to prejudice a party, we will not reverse his ruling. Lackey, 755 So.2d. at 1086 (para 10) (quoting Rushing, 724 So. 2d. at 914). Further, we "will affirm the [child custody] decree if the record shows any ground upon which the decision may be justified. We will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all of the factors relating to the best interests of the child". Mosley v. Mosley, 784 So. 2d. 901, 905-906 (para 15)(Miss. 2001)(quoting Yates v. Yates, 284 So. 2d 46, 47 (Miss 1973)) . Pg. 280.

It should be noted that Webb was affirmed and the chancellor's custody ruling was left untouched.

In Brekeen, the chancellor found the mother to be a good parent. However, practically his entire opinion concerned her adultery. The court remanded the case back to the lower court for an Albright analysis.

In the case at bar the chancellor based her ruling on an extensive Albright analysis. Her opinion should be affirmed.

ISSUE II

IT IS IN THE BEST INTEREST OF THE CHILD THAT HER LEGAL AND PHYSICAL CUSTODY BE GRANTED TO THE FATHER.

Richie strongly demonstrated that he was entitled to the primary physical and legal custody of Rachel. Richie will continue to live in the marital domicile. He will continue to see to the child's religious and moral upbringing. Richie will continue to cook, clean, and see to the other daily needs of the child.(Tr. 33,34,35,40)

Louise remains available to carry the child to school, to pick the child up after school, to carry the child to church on Wednesdays and Sundays when Richie cannot.(Tr. 230, 231)

Miss Ruth is still available to keep Rachel while Richie works. She will continue to look after Rachel's needs and to further her education. She will continue to give Rachel the love and affection that she has given her five and sometimes six days a each week. (Tr. 195)

Richard Woodham and Kaye Moore are still available to help with Rachel if need be.

On the other hand, Amanda will continue to work at La-Z-Boy, continue to live in a new environment, and continue to put Rachel in a day-care situation. Her parents will continue to work full-time with little or no time left over for Rachel. And Amanda continues to put the focus of her life on her relationship with Ashley Thrash--- not Rachel.

In the final analysis the chancellor heard all of the testimony and facts in this case. She based her ruling on the facts as presented and applied the law thereto. The chancellor's ruling falls squarely within the ambit of her discretion. Further, it is safe to say that her ruling was based upon substantial credible evidence. Consequently, her decision should be affirmed by this Court. See: Sturgis v. Sturgis, 792 So. 2d. 1020, 1023 (Miss. Ct. App. 2001); Devito v. Devito, 967 So. 2d. 74, 75 (Miss. Ct. App. 2007); and Copeland v. Copeland, 904 So. 2d. 1066, 1074 (Miss. 2004).

ISSUE III

THE CHANCELLOR WAS CORRECT IN AWARDING THE PRIMARY PHYSICAL AND LEGAL CUSTODY OF THE MINOR CHILD UNTO THE FATHER

In determining child custody that is in the child's best interest, the Mississippi Supreme Court has directed that the factors listed in Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) be considered by the lower courts and those factors are: 1) age, health and sex of the child; 2) the

continuity of care; 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 parent and responsibilities of that employment; 5) physical and mental health and age of the parent; 6) emotional ties of parent and child; 7) moral fitness of the parent; 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.

Factor No. 1: Age, Health and Sex of the Child

Rachel is four (4) years old. (Actually she is now five (5) years old). The old tender years doctrine does not apply to this case. A child is no longer of tender years when that child can be equally cared for by persons other than the mother. Further, this doctrine has been weakened in recent years and now is only a presumption to be considered along with the other Albright factors. See: Copeland v. Copeland, 904 So. 2d 1066, 1075 (para 34) (Miss. 2004); Mercier v. Mercier, 717 So. 2d. 304, 307 (Miss. 1998); Hollon v. Hollon, 784 So. 2d. 943, 947 (Miss. 2001). It should be noted that the chancellor ruled as follows:

....Tender years' doctrine is not applicable since the child can be cared for by either parent. Both parents have cared for the child at least half (½) of the time since the time of separation. Ruth (Ruth Woodham) has kept the child eight (8) hours a day, five (5) days out of the week and some Saturdays, since her birth. During the marriage Richard was primarily responsible for getting the child to the sitter in the mornings and Amanda picking her up from the sitter in the afternoon. Therefore, this factor favors both parties equally.

Rachel has an extremely close relationship with Richie. Richie has taken very good care of her both before and after the date of separation. He has a very strong family support network which can help him if need be. Therefore, because of the age of the child and the fact that she has such a

close relationship with Richie and his family, the tender years' doctrine is not applicable in this particular instance. Therefore, this factor does not favor either party.

Factor No. 2: Continuity of Care

The lower court found that this particular factor weighed in favor of both parties equally. Her finding was as follows:

Amanda returned to work about six (6) to eight (8) weeks after Rachel was born. Ruth, the paternal great-grandmother, became Rachel's care giver and has provided the majority of the childcare services of Rachel up through this hearing. Richard carried Rachel to the sitter in the mornings, while Amanda was at work. Amanda, most often, picked Rachel up from the sitter in the evenings. When Rachel was home Richard and Amanda provided for her basic needs. This factor weighs in favor of both parties equally.

It is obvious that the Court paid extremely close attention to the facts as presented to her by both parties. It should be noted that when Amanda went to work at six o'clock in the morning, Richie got Rachel up, got her ready, fed her breakfast, changed her diaper, put her clothes on, and then took her to Miss Ruth's home before he went to work. He did this five (5) days a week. (Tr. 30,450). Richie carries Rachel fishing, plays outside with her, has played on the swing and in her sand box with her, and has carried her to the playground. (Tr. 31) He reads to her on a daily basis, has potty trained Rachel, has cooked for Rachel, brushes her teeth, and does all of the things that a parent should do in the raising of a child. (Tr. 31, 32, 33)

Miss Ruth testified that she started keeping Rachel on a daily basis when Rachel was seven (7) weeks old. She keeps the child Monday through Friday from 7:00 a.m. until 4:30 or so in the afternoon. Sometimes in the past she has kept the child on Saturdays so that Amanda could either sleep in or get her work done. Miss Ruth feeds Rachel breakfast in the morning, brushes her teeth, plays games with her, and does puzzles with her. In the afternoons they play and color and Rachel

rides her bicycle. Miss Ruth has taught the child her ABC's, how to write her letters and how to count all of the way up to 60. Miss Ruth reads to her every day. As a matter of fact Rachel and Miss Ruth are so close that when Rachel was carried to a daycare facility by Amanda the child became so upset that she had to be carried back to Miss Ruth's home. (Tr. 184,185, 186, 187, 188, 433, 434, 435.) Even Patricia McMillan, the mother of Amanda, admitted that the child did not do well at Mrs. Stamper's daycare. Mrs. Stamper was concerned about Rachel being adversely affected by her separation from Miss Ruth, and Amanda had to carry the child back to Miss Ruth.(Tr. 280, 281)

In Bellais v. Bellais, 931 So. 2d. 665, pg. 668(Miss. App. 2006), both parties cooked, fed, bathed, dressed and otherwise took care of the children prior to the separation. As a result the chancellor found that the continuity of care prior to separation favored neither party.

Amanda makes much of the fact that Richie works on the railroad. However, Richie is off two (2) days every week from his work, has nine (9) days for vacation, from April 1 through June 4, 2007, was off twenty-three (23) days from his work, and when off from work he is with his daughter. It should be noted that although he sometimes works late, he often gets off early in the afternoon. Further, Amanda also has to work and while she is working someone else has to keep the child for her as well. (Tr. 362, 363, 364, 365, 366, 367)

Amanda cites Tritle v. Tritle, 956 So. 2d. 369 (Miss Ct. App., 2007). Amanda is correct in that Tritle is very similar to Woodham. When Richie is not at work, he is with Rachel. He is not with his girlfriend as Amanda is with her boyfriend. As was stated in Tritle, this does indicate a great commitment on the part of Richie towards Rachel. Further, in Tritle the Court noted that divorce is a stressful transition. In the case at bar, this stressful transition was brought about by Amanda's adulterous affair.

The chancellor ruled that both Amanda and Richie equally shared in the duties of taking care

of Rachel. However, it is this writer's opinion that this factor shifts in favor of Richie when it is considered that Miss Ruth, Richard Woodham, and Louise kept the child for many hours during the day and night. The undersigned believes that this factor should have been awarded to Richie. However, the chancellor chose not to do so, and based her decision on the facts as she saw them.

Factor No. 3: Which Parent has the Best Parenting Skills and Which Has the Willingness and Capacity to Provide Primary Child Care:

When the chancellor's opinion is read, it is obvious that she was paying very close attention to the testimony and facts as they came to her from the witness stand. She noted that Amanda testified that:

...during much of the marriage that she went to work earlier than Richard, and left Rachel home with Richard, who naturally would have been responsible for getting the child up in the morning and taking her to the sitter...

...Richard has demonstrated a desire to provide for the primary care of the minor child. It appears that other than Richard's employment, Rachel is his only interest. On the other hand, Amanda has sacrificed both the relationship with her child and her marriage to be with John Ashley Thrash....
(R.E. 37)

Under cross examination Amanda admitted that she would drink beer while driving and that Rachel would be in the car. She admitted that this indicated poor parenting skills, but she would not do this in the future. (Tr. 426, 427) Amanda also admitted that she smokes when Rachel is in the car, and she agreed that this was not good for Rachel. (Tr. 442) The chancellor was correct in taking note of these facts. Amanda had sex with Mr. Thrash when Rachel was present. This would surely indicate poor parenting skills.

When Amanda had to be at work at 6 o'clock a.m., Richie would take Rachel to Miss Ruth's, and Rachel would stay at Miss Ruth's house until Amanda picked her up after work. Miss Ruth has

continued to keep the child.(Only when Rachel is with Amanda does she go to daycare.) The child has done very well with Miss Ruth. She has, in effect, operated a kindergarten for Rachel, and the child has progressed greatly so far as her education is concerned.

Rachel did very well going with Richie to Gulf Shores for vacation. She enjoyed going to the beach and enjoyed being with her daddy. Amanda admitted that so far as she knew that during the time that Richie was off from work that he spent it with Rachel. Amanda also admitted that Richie knows how to cook, vacuum, and dust. (Tr. 427, 432, 433, 434, 435, 436, 437, 438, 441)

Richie testified that he has done everything necessary in order to take care of the child. He fixes her breakfast, fixed her bottle when she was a baby, fed her cereal when she started eating cereal, changed her diaper, and dressed her. He has taught her to count, helped her with her ABC's, reads to her on a daily basis, and even potty trained Rachel. He carries her to church when he is not working; and, if he is working, the child goes with his mother, Louise. He cooks spaghetti, hotdogs, hamburgers and all other kinds of food that Rachel likes to eat. He has carried her to the State Fair and the Museum of Natural Science. When Rachel was a baby, he would give her a bottle at night, burped her, changed her diapers, and rocked her to sleep. He is patient with Rachel. He understands her needs, and he puts Rachel first in everything that he does. He has a very close, loving relationship with Rachel. (Tr. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40)

In Copeland v. Copeland, 904 So. 2d. 1066, pg. 1076 (Miss. 2004), the Court ruled in favor of the father when it considered that the mother would leave the child during the day with a nursery worker who had a number of other children to look after while the father would leave the child with his mother who lived across the street. Also, the grandmother had kept the child during the day before the parties separated.

Copeland is on all fours with the case at bar. Amanda desires to place Rachel in day care. If

Richie is awarded custody, Rachel's life will not be disrupted. She will continue to live in the home in which she has lived since birth, and Miss Ruth will continue to keep her while Richie is at work. Further, Richie's foremost concern is for Rachel's well being. Amanda has other concerns other than Rachel's well being. Consequently, the chancellor was correct in giving this factor to Richie.

Factor No. 4: The Employment of the Parents and Responsibilities

of the Employment:

At the present Amanda goes to work at 7:15-7:30 a.m. and does not get off until 4:00 p.m. She works 5 days each week.

Richie works as a conductor on the railroad. He does leave early in the morning. Sometimes he works twelve (12) hour days. Sometimes he gets off from work early. But he is off work two (2) days each week. He has liberal vacation days. From April 1, 2007, through June 4, 2007, he was off work for twenty-three (23) days. When he was not at his job, he was at home tending to Rachel.

When Richie has to be at work, his family support network steps in. Rachel is loved and well cared for by Miss Ruth, Louise, and Richard Woodham. On the other hand, while Amanda is at work, she puts Rachel into a daycare facility. It is obvious that Rachel's care by Richie's family is superior to her being placed in a daycare environment. (Tr. 49, 50, 161, 170, 362, 363, 364, 365, 366, 367, 433)

In her opinion the chancellor took note of Richie's "strong family support network". This certainly ameliorates the demands of his employment. In Webb, at pg 278 (para 19), this court quoted approvingly the chancellor's ruling in regards to this issue:

.... He (Jeffery Webb) traveled approximately 4 to 6 days a month. When he traveled his parents, who are 65 and 53 years old, took care of Brayden. His parents also took care of two other grandchildren.... Also, the chancellor noted that when Jeffery needed a sitter his parents were able to help and

Lorena had to rely on a friend. The chancellor found that it was better for Brayden to be with family if he could not be with a parent. We cannot find that the chancellor, sitting as the fact finder, abused his discretion of making this decision.

Richie believes that this factor should weigh in his favor because of the strong family support network that he has at his disposal. But the chancellor, in her discretion, found that this factor does not favor either party. In view of the case law the chancellor's finding should be allowed to stand since it is a discretionary call.

Factor No. 5: Physical and Mental Health and Age of the Parents:

Both parties are in their early thirties. Richie is in good health. However, Amanda suffers from depression and takes antidepressants. She compounds this emotional/ mental problem by mixing her prescription medications with alcohol. (Tr. 14, 55, 56, 57, 59, 283, 284, 285, 370) To say the very least, this is an unwise choice. If she were to have a reaction from this mixing of drugs and alcohol, it could lead to a terrible tragedy. Rachel should not be in her mother's presence when she does this.

In Mabus v. Mabus, 890 So. 2d. 806, 817 (para 44) (Miss. 2003) the Court found that there "was some evidence that she (Julie Mabus) has some anger management problem and that the stress of the proceedings and circumstances had taken a toll on her mental health and stability." In the case at bar the chancellor found that "there was no proof offered to show that mixing Lexapro with alcohol cause harm to an individual, such behavior does show poor judgment on the part of Amanda.(R.E. 38)

Pursuant to Mabus at 817, the chancellor was certainly within her discretion to find that this factor weighs in favor of Richie.

Factor 6: Moral fitness of the Parents:

Amanda argues that since there was no harm to Rachel arising out of her adultery that this should be a neutral factor. This is contrary to the established law of this state. In Trittle v. Trittle, 956 So. 2d. 369, 377 (para 31)(Miss App. 2007) this Court wrote as follows:

Park cites McCraw v. McCraw, 841 So 2d. 1181, (para. 17)(Miss. 2003) and claims that marital fault should not be used as a sanction in awarding custody. That was not the precise holding in McCraw. Rather, McCraw stated, “Sexual misconduct ... is not per say grounds for denial of custody” id. (Quoting Hollon v. Hollon, 784 So. 2d. 943 (para. 25)(Miss 2003)). In any event, the moral fitness of each parent is most certainly a factor to be examined in awarding custody. id. (para. 6).

In Mabus, at pg. 817(para 46) the Court quoted approvingly the Chancellor’s finding in regards to the moral fitness of the parents, and wrote as follows:

The chancellor found this factor (moral fitness of the parents)weighed in favor of Ray. A divorce was granted on the grounds of uncondoned adultery. Nevertheless, the chancellor specifically stated that [while] it is not the purpose of this Court to punish adultery, it is a factor to consider in awarding custody of minor children.” The chancellor concluded that the affair interfered with Julie’s ability to effectively parent, regardless of whether the children knew of it.

Therefore, it is obvious that moral fitness was certainly an issue to be considered by the court regardless of whether the child knew about her mother’s adultery or not. In this particular case it is obvious that the child could have very well have known about her mother’s adulterous activity. Both Amanda and Ashley Thrash, Amanda’s lover, admitted that the child was present on some of the occasions when they had sex. Further, they admitted that on one occasion when they were in bed the child came into the bedroom and got into the bed next to Amanda. (Tr. 11, 12, 13, 404, 405, 406, 407, 408). Therefore, the Court was eminently correct in awarding this factor to Richie.

Factor No. 7: The Home, School and Community Record of the Child:

The chancellor ruled that this factor favored the father. Although the minor child is only four (4) years of age, she has established a home and school record. Rachel is a very smart child and is very advanced for her age. She has reached this advanced state because of the hard work and attention paid by Richie and Miss Ruth to Rachel's development. Amanda admitted that the child has done very well with Miss Ruth. (Tr. 433) Amanda admitted that Miss Ruth read to the child, and that the child stayed with her seven or eight hours a day, five days a week. (Tr. 433) She admitted that Miss Ruth has helped teach the child how to count, has been a part of teaching the child how to write her name, taught her the ABC's, and has played games with the child. (Tr. 434)

Miss Ruth testified that she has taught Rachel her ABC's, taught her how to write her letters, and taught her how to count all of the way to 60. (Tr. 186, 187) Richie and Miss Ruth read to Rachel every day. (Tr. 32, 188) Richard Woodham, Richie's father, testified that Miss Ruth taught Rachel to write her name, to recognize her ABC's, and to pick the states out on the map. (Tr. 218). Louise testified that Richie and Miss Ruth have taught the child how to write her ABC's, her numbers, how to count, and that they read books together. (Tr. 227, 228, 229).

It is obvious from a close reading of the record that the Rachel has progressed because of the hard work, attention, and long hours spent by Richie and Miss Ruth in working with this child. Therefore, the chancellor was eminently correct in awarding this factor to Richie.

Factor No. 8: Stability of home environment and employment of each parent:

A family support system that provides assistance for the child is to be considered. Brock v. Brock, 906 So. 2d. 879 (Miss. App. 2005). "The fact that Robin has a family support system that has provided assistance in the past is encouraging. ...The purpose of the chancellor's statement, however, was not to disparage J.D.'s family support system but to demonstrate that the children

would receive good care in Eupora.” Pg 884. Further, if one parent is living in a home that was the home of the child at sometime, this would contribute to the child’s stability. Pg 887.

In Taylor v. Taylor, 909 So. 2d..1280, 1282 (para 19) (Miss. App. 2005) the Court wrote as follows:

The chancellor also reviewed the stability of the home environment and employment of each parent as well as other factors relevant to the parent/child relationship. The chancellor considered that Greg Taylor retained possession of the marital residence, which was the place that both children considered as their home most of their lives, in addition to Greg Taylor’s job stability. According to the Chancellor, this factor favored the father.

Further, if the marital domicile was an appropriate place to raise the child before the separation, then it would continue to be an appropriate place to raise the child. Mabus, at pg. 818.

As is shown abundantly before, Richie has an excellent family support system in the form of his grandmother and parents. He continues to live in the marital home, and it has been awarded to him as his separate property in this case. Therefore, the stability of the child would continue uninterrupted if custody remained in Richie. Therefore the Court was eminently correct when she ruled that the stability of the home environment favored Richie.

Richie has held numerous jobs during the marriage, but he has never been without a job. He has worked consistently throughout the marriage. He now works for the railroad and makes an excellent income. It should be noted that he started working for the railroad on June 20, 2005. He has continued to work for the railroad and expects to continue to do so. (Tr. 45,46,47,48)

This work history would certainly lend credence to Richie’s consistency and stability in holding down full-time, gainful employment. The chancellor failed to give the necessary weight to these factors. Instead of favoring Amanda with this factor, stability of employment should have been

a neutral factor. The chancellor misunderstood this particular factor. However, this was a discretionary call, and the chancellor has broad discretion.

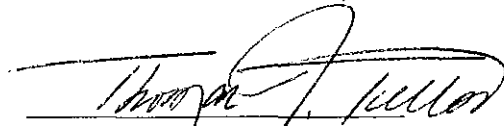
CONCLUSION

We believe that a fair consideration of the evidence in light of the Albright factors would lead to the following conclusions:

<u>Factors</u>	<u>Factors to Consider</u>	<u>Who should get the factor?</u>
(1) Age, health and sex of the child		Neither
(2) Determination of the parent that had the continuity of care prior to separation		Richie
(3) Which Parent has the Best Parenting Skills and Which has the Willingness and Capacity to Provide Primary Child Care		Richie
(4) The Employment of the Parents and Responsibilities of the Employment		Richie
(5) Physical and Mental Health and Age of the Parents		Richie
(6) Emotional Ties of Parent and Child		Neither
(7) Moral Fitness of the Parents		Richie
(8) The Home, School, and Community Record of the Child		Richie
(9) The Preference of the child at the age sufficient to express a Preference by law		Neither
(10) Stability of home environment and employment of each parent.		Richie

When the Albright factors are considered, seven factors should come down on Richie's side of the scales, three factors should not be awarded to either party, and no factors should be given to Amanda. It is crystal clear that primary custody of Rachel should be awarded to Richie.

Respectfully Submitted,
Richard Blant Woodham, Jr.


By: Thomas L. Tullos, His Attorney

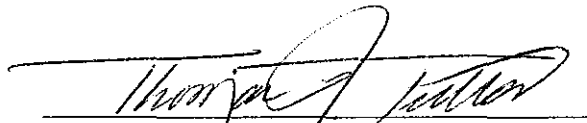
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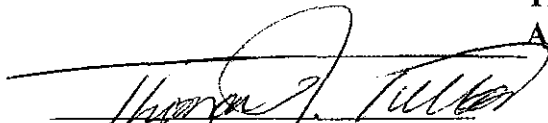
I, Thomas L. Tullos, Attorney at Law, do hereby certify that I have this date, mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to:

Honorable Robert M. Logan
Logan & May
Post Office Box 218
Newton, Mississippi 39345

Hon. Janace Harvey-Goree
Chancery Court Judge
P.O. Box 39
Lexington, MS 39095-0039

This the 22 day of July, 2008.


THOMAS L. TULLOS
ATTORNEY AT LAW


THOMAS L. TULLOS
ATTORNEY AT LAW
P. O. DRAWER 567
BAY SPRINGS, MS 39422
PHONE: (601) 764-4258
STATE BAR NO. [REDACTED]
ATTORNEY FOR:
RICHARD BLANT WOODHAM, JR.