

2007-CA-01940

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AMANDA WOODHAM

APPELLANT

V.

NO. 2007-TS-01940

RICHARD WOODHAM

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

Amanda Woodham – Defendant/Appellant

The Logan Law Firm, P.A. – Attorneys for Appellant
Robert M. Logan – Attorney for Appellant

Richard Woodham – Plaintiff/Appellee
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STATEMENT OF ISSUES

- I. DOES THE TRIAL COURT'S AWARD OF FULL CUSTODY TO THE FATHER AMOUNT TO A PENALTY AGAINST THE MOTHER FOR ADULTERY?
- II. IS GRANTING OF FULL CUSTODY TO THE FATHER IN THE CHILD'S BEST INTEREST?
- III. HAS THE CHANCELLOR PROPERLY CONSIDERED AND APPLIED THE *ALBRIGHT* FACTORS?

STATEMENT OF THE CASE

A. Lower Court Proceedings

This action commenced on May 24, 2006, with a Complaint for Divorce filed by Plaintiff Richard Woodham (hereafter "Richie") in Newton County Chancery Court against Amanda Woodham (hereafter "Amanda"), alleging adultery and seeking custody of the minor child (R.E. 5). Amanda counterclaimed, charging Richie with habitual cruel and inhuman treatment and also seeking custody of the child, Rachel Woodham (hereafter "Rachel") (R.E. 16).

Trial commenced with a Special Chancellor on May 17, 2007. The trial could not be completed in the first setting and was concluded on June 18, 2007. The Special Chancellor's Findings Of Facts And Conclusions Of Law was filed on August 8, 2007 and the Amended Findings Of Facts And Conclusions of Law was filed on October 15, 2007 (R.E. 31). Final Judgment was also entered on October 15, 2007 (R.E. 44).

The primary issue at trial was custody of Rachel, as property matters were resolved by agreement announced to the Court. The allegations of adultery were not denied,

judgment was entered in favor of Richie for divorce on that ground, and Richie was granted full legal and physical custody of Rachel. Amanda was ordered to pay \$240.40 per month child support (R.E. 44).

Amanda noticed her appeal to this Honorable Court on October 23, 2007 (R.E. 4).

B. Statement of Facts

Amanda and Richie married on September 21, 1996 and lived at Pecan Road in Newton, Mississippi (Rec. 24). Their only child, Rachel, was born June 12, 2003 (Rec. 25). Amanda had her thyroid removed in 2004 and spent a short time in the hospital (Rec. 110, 370). The parties separated when Amanda left the marital home in February of 2006 and moved with Rachel into an apartment in Newton (Rec. 374). Other than that hospital stay, Rachel never spent more than a night away from Amanda until May 17, 2006 (Rec. 110).

Prior to May 17, 2006, when Richie kept Rachel away from Amanda for a full week, Amanda had primarily tended to the needs of Rachel, doing the majority of the feeding, bathing, clothing, grooming, administering of medication, and trips to the doctor (Rec. 376). Richie helped with some of those things, but preferred to do other things when he was off work, as explained in his lengthy letter to Amanda delivered in February of 2006 (Ex. D1).

After a temporary order was entered on May 26, 2006, the parties undertook a joint custody schedule of alternating weeks of visitation (R.E. 13). Richie and his family remained hostile to Amanda throughout, holding her to the letter of the temporary visitation schedule even when it was potentially to the detriment of the child, such as when Richie refused to let Rachel see Amanda on the child's birthday (Rec. 351, 352).

From Amanda's viewpoint the marriage broke down due to the inattention of Richie to his home and family, culminating in Amanda having an adulterous affair (Rec. 372). The adultery has not been denied and Amanda concedes it provides grounds for divorce.

The trial of this action was quite contentious. Richie's witnesses delved into the adultery, which was never denied, in minute detail (Rec. 25-29 and Rec. 402-15). He accused Amanda of drinking and smoking excessively and not being attentive to Rachel (Rec. 53, 63). The allegation of inattentiveness was contradicted by a lengthy letter he wrote to Amanda just prior to their separation in which he praised her as a mother (Ex. D1, Rec. 113). Ruth Woodham, Richie's grandmother, also added praise for Amanda's mothering ability (Rec. 205). Cross-examination revealed that Richie himself was an active drinker (Rec. 159-60, 313, 321, 369). Amanda testified she smokes half a pack of cigarettes a day and very rarely drinks (Rec. 369).

Richie admitted in his correspondence to Amanda that he had not paid much attention to Rachel prior to the separation (Ex. D1, Rec. 113-116), and this is corroborated by other witnesses. The neighbor who lived across the street from the parties while they were together testified she never saw Richie playing in the yard with Rachel, while Amanda did so "all the time." (Rec. 250).

The hostility of Richie and his family continued to the last day of trial, which was a full year after the parties separated (Rec. 259, 318, 379). Richie ran Amanda and her father out of the funeral home when his maternal grandmother died (Rec. 317). Richie's father will not speak to Amanda (Rec. 379). Richie's grandmother will not allow Amanda to come to her house (Rec. 206). Richie has severed his ties with Amanda's parents (Rec. 259). On the other hand, Amanda's parents made it clear they still have affection for Richie (Rec. 259, 319). A tape admitted into evidence indicates Richie makes disparaging remarks to Rachel about Amanda (Rachel, at age 3, asks Amanda why she was "aggravating" her daddy) (Rec. 396-97).

Richie is the product of a broken family. His mother has been married five times (Rec. 155) and his father twice (Rec. 156). His father now lives with his "fiancé." (R.E. 31, Rec. 156). Richie's father and mother don't speak to each other, and it is necessary to have an extra

birthday party each year for Rachel so they won't see each other (Rec. 115). Richie grew up having closer ties to his step-father than to his father (Ex. D-1), and has told Amanda's parents he felt closer to them than to his own parents (Rec. 313).

Amanda grew up in Newton. She has worked at La-Z-Boy as a scheduler for eight years (R 368). Her work hours are from 7:30 a.m. to 3:00 p.m. Monday through Friday (Rec. 432). She has been married once and has only one child. Amanda's parents also live in Newton. They hold responsible jobs [he is business manager for the Meridian Airport Authority (Rec. 310) and she is the Superintendent's secretary at the Newton Municipal School District (Rec. 254)]. They have only one grandchild and have been actively involved in Rachel's life. These grandparents have been married to each other for 33 years (Rec. 253).

Mrs. Ruth Woodham has been a day-care provider for Rachel, but at the time of trial the parties were facing the fact Rachel would be in pre-kindergarten in the fall, meaning the need for day-care services will be greatly decreased (Rec. 133, 34). Mrs. Ruth Woodham is 84 and takes four medications for a heart condition (Rec. 201).

Richie has had six jobs since the parties married in 1996 (R.E. 31). He presently works for Kansas City Southern. He works on the "extra board" for KCS. As reflected by testimony and the work schedules admitted into evidence, his work is sporadic, with unexpected layoffs and variable work days and hours (Rec. 352-65, R.E. 31). His latest schedule requires him to get up at 4:30 a.m., take Rachel to Ruth Woodham's house, then leave for work (Rec. 360). He returns home from work as late as midnight, after a one-hour drive from his work site (Rec. 356). Since Ruth Woodham drives only to church and the beauty parlor, some third party will have to take Rachel to school and pick her up (Rec. 361). Presumably she will stay with Ruth, rather than her own mother, until Richie's return.

SUMMARY OF THE ARGUMENT

A. The Court's award of custody to the father under the circumstances amounts to a "penalty" against the mother for adultery.

In the trial court's Amended Findings Of Fact And Conclusions Of Law (R.E. 37), she stated that "... Amanda has sacrificed both the relationship with her child and her marriage to be with John Ashley Thrash" (emphasis added). There is no evidence in the record to support Rachel suffering in any way as a result of Amanda's infidelity. There is no testimony that the relationship between Amanda and Rachel was anything other than warm, loving and healthy. To say that the adultery amounted to a "sacrifice" of the parent-child relationship harks back to Mississippi domestic practice prior to 1983, when the *Albright* decision was rendered, 437 So.2d 1003 (Miss. 1983).

B. Granting full physical and legal custody to the father is not in the child's best interest.

Pursuant to Section 93-5-24, *Miss. Code Ann. (1972)*, the Chancellor has four options in a custody case:

- (1) "Physical and legal custody to both parents jointly. . ."
- (2) "Physical custody to both parents jointly . . ."
- (3) "Legal custody to both parents jointly. . .and physical custody to either parent."
- (4) Physical and legal custody to either parent."

The Chancellor gave Amanda the least amount of time and influence with Rachel she could under the statute. She cannot even participate in critical decisions concerning her four-year-old child when she and the child's father live in the same community.

We believe the Chancellor completely overlooked the importance of a mother in the life of a little girl. As the facts highlighted below will show, the trial court has substituted the role of the child's great-grandmother for the relationship she could otherwise have with her mother.

C. The Chancellor has improperly applied the *Albright* factors.

As will be developed fully hereafter, the Chancellor has misapplied the factors delineated in *Albright*. We believe this stems from the over-emphasis on the adulterous affair, which was never denied by Amanda.

ARGUMENT

A. AWARDING FULL CUSTODY TO RICHIE UNDER THE CIRCUMSTANCES OF THIS CASE AMOUNTS TO A PENALTY AGAINST AMANDA FOR ADULTERY

There was a time when parents who committed adultery automatically lost custody of their children. In *Carr v. Carr*, 480 So.2d 1120, 1122 (Miss. 1985), our Supreme Court discussed "whether adulterous conduct of a parent, per se, should preclude an award of custody of minor children," citing several older Mississippi decisions wherein the parent guilty of infidelity was denied custody, e.g. *Winfield v. Winfield*, 203 Miss. 391, 35 So.2d 443 (1948); *Hulett v. Hulett*, 152 Miss. 476, 119 So. 581 (1928); *Keyes v. Keyes*, 252 Miss. 138, 171 So.2d 489 (1965). As stated by the Court in *Carr*:

. . . In earlier decisions, custodial law was used to punish and penalize spouses guilty of marital fault. The development of exceptions to the general rule evidenced a changing attitude. Generally, courts now consider the best interest rule, not marital fault, as the primary guide in custody determinations. Id. at 1122

The *Carr* court recognized the changes expressed in *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983) (marital fault not to be used as a sanction in award of custody – in a case involving a child of tender years), and extended the *Albright* holding to "all minor

children.” In affirming the lower court’s awarding of custody to the unfaithful parent the Court stated:

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* at 1123.

In the instant case the Chancellor, in her findings, concluded Amanda had “sacrificed” her relationship with her child to spend time with her paramour, and had “exposed Rachel to her adulterous affair.” (R.E. 37). This Court, of course, should be slow to reverse a Chancellor’s findings. . . except where there is no evidence to support them, or there is an abuse of discretion. *See Brekeen v. Brekeen*, 880 So.2d 280 (Miss. 2004) (Appellate Court obliged to overrule Chancellor where *Albright* factors improperly considered); *Webb v. Webb*, 974 So.2d 274, 276 (Ms.Ct.App. 2008).

There is no evidence the child was ever aware of any adultery, or harmed by it. She was, after all, a toddler at the time of the separation (age 2). She once walked into a dark bedroom where Amanda and her boyfriend were in bed (Rec. 13), but there is no evidence she had any awareness of his presence. There is no evidence that the relationship between Rachel and Amanda has been harmed whatsoever. To the contrary, the record is replete with evidence of the affection Rachel has for her mother. The chancellor found that “Rachel is close to both parents.” (R.E. 38)

This Court has recently held that “. . . cohabitation is relevant only to the extent it can be shown to affect the child adversely.” *Mayfield v. Mayfield*, 956 So.2d 337, 345 (Miss. 2007).

The Chancellor here has condemned Amanda for her infidelity and allowed that condemnation to spill over into her analysis of the entire case.

B. GRANTING FULL PHYSICAL AND LEGAL CUSTODY TO THE CHILD'S FATHER IS NOT IN THE CHILD'S BEST INTEREST.

Our courts are unanimous in holding that the polestar consideration in deciding issues of child custody is the "best interest" of the child. *E.g. Albright v. Albright*, *Supra* at 1005; *Brock v. Brock*, 906 So. 2d 879, 882 (Ms.Ct.App 2005). This guidepost prevents courts from using custody awards as a means of punishing marital wrongdoing.

Courts in Mississippi have long given deference to mothers having custody of children "of tender age," especially of female children. *See McWhirter v. McWhirter*, 811 So.2d 397 (Ms.Ct.App. 2001). Here, the mother has been relegated to the position of a visitor, supplanted as custodian by the child's great-grandmother, who will spend the majority of the time with the child while Richie is working. (Rec. 360-61).

In the May hearing Richie testified he was working for KCS from 6:31 a.m. to 6:30 p.m., five days a week, with a one-hour drive each way. (Rec. 48). In the trial's second session, in June, he testified his work had again changed, and that he could come home as early as 4:30 p.m. or as late as 11:30 p.m. (taking driving time into account), but that work begins each day at 6:31 a.m. (Rec. 360). He wakes Rachel up at 4:30 a.m. and takes her to his grandmother (Rec. 360). If Rachel gets 8 ½ hours of sleep she has to go to bed at around 8:00 p.m. every night. This means Richie's time with her is severely limited on weekday afternoons, and sometimes nonexistent. Richie cannot care for Rachel without significant assistance from his grandmother, while Amanda is available after 3:00 p.m. every day to care for her daughter.

This issue was addressed in *Tritle v. Tritle*, 956 So.2d 369, 374 (Miss. 2007) (paternal grandparents' willingness to help commendable, but did not supplant role of mother who was willing and available to tend to children).

The Court dealt with a similar situation in *Moak v. Moak*, 631 So.2d 196 (Miss. 1994), affirming the Chancellor's award of custody to the wife, despite her adultery, where she had been the primary caregiver, he had odd hours, and relied on his mother, who had health issues, to provide childcare.

C. THE CHANCELLOR HAS INCORRECTLY CONSIDERED AND APPLIED THE *ALBRIGHT* FACTORS, AND IN PARTICULAR ERRED REGARDING:

- (1) AGE, HEALTH AND SEX OF THE CHILD;
- (2) CONTINUITY OF CARE;
- (3) PARENTING SKILLS, WILLINGNESS AND CAPACITY;
- (4) PHYSICAL AND MENTAL HEALTH AND AGE OF THE PARENTS
- (5) MORAL FITNESS;
- (6) HOME, SCHOOL AND COMMUNITY RECORD OF THE CHILD;
- (7) STABILITY OF HOME ENVIRONMENT AND EMPLOYMENT OF PARENTS.

(1) Age, health and sex of the child

The Chancellor found this factor favored the father, but never discussed the sex of the child in her findings and conclusions.

The “tender years” doctrine no longer establishes a *per se* custody presumption in favor of the mother in Mississippi; yet “it is still a viable consideration in custody determinations.” *Street v. Street*, 936 So.2d 1002, 1010 (Ms.Ct.App. 2006) (citing *Copeland v. Copeland*, 904 So.2d 1066 (Miss. 2004)). Age and sex are significant factors in custody decisions. In *Sandlin v. Sandlin*, the trial court concluded sex of the son favored custody in the father and sex of the daughter favored custody in the mother, and custody was split, 906 So.2d 39, 41 (Ms.Ct.App. 2004). See *Banek v. Banek*, 455 So.2d 766, 767 (Miss. 1984), wherein the Court stated: “A Chancellor sitting in a child custody case cannot ignore biology in deciding whether an infant should ordinarily be with the father or mother.”

We find no precedent in Mississippi for the proposition that a three-year-old is not “of tender years,” and certainly the fact she is a female should favor custody by the mother.

The Chancellor chose to ignore totally the issue of the child’s sex. *Albright v. Albright* established the sex of the child as a factor coequal with age and other factors. *Id.* at 1005. Courts have considered the sex of the child as favoring the father in the care of boys’ custody and favoring the mother in the case of girls’ custody. See *Sandlin*, *Supra*.

We believe this factor favors the mother.

(2) Continuity of care

The Chancellor found this factor favored the father, but did not discuss pre-separation care, basing her ruling on what Richie did under the temporary custody order.

This is an example of the trial court overlooking facts. Amanda and Rachel moved out of the marital home into an apartment separate from Richie more than three months prior to May 17, 2006, during which time she had sole custody of Rachel. (Rec. 384). A period of shared custody ensued after May 17, 2006, with each parent having custody on alternating weeks. Throughout this period Richie was an “extra board” railroad worker, with an erratic work schedule requiring him to be away from home frequently. (R.E. 34).

Rachel had only spent one night away from her mother prior to May 17, 2006. (Rec. 110, 111). Prior to the separation Amanda was primarily responsible for Rachel’s care, with some help from Richie (Rec. 375, 376). At best, Richie split time with Amanda (to the extent allowed by his erratic schedule) for the duration of the temporary order prior to trial.

Continuity of care is a fact-specific issue. The Chancellor can find for either party, depending on the evidence. However, the findings must be based on evidence found in the record. We agree there was a period of split custody preceding the divorce under the Temporary Order (R.E. 13). During that period of time, because of Richie's erratic work schedule, he saw Rachel less than his grandmother did. The trial court failed to mention Amanda's three months in the apartment with Rachel prior to the litigation, and the very limited parenting role played by Richie prior to separation (Rec. 375, 376).

This Court made it clear in *Caswell v. Caswell*, 763 So.2d 890, 893 (Ms.Ct.App. 2000), that *Albright* requires an analysis of continuity of care "prior to the separation" as well as after (distinguishing *Jerome v. Stroud*, 689 So.2d 755, 757 (Miss. 1997)). Obviously, the Court attributed the paternal grandmother's time with the child as part of Richie's "continuity of care." The custody issue here is not between Ruth Woodham and Amanda Woodham. It is between Amanda and Richie. However admirable Ruth Woodham's efforts may have been, she is a great-grandmother, and has no custodial rights! Parents are entitled to preference in child custody over all third parties. Section 93-13-1, *Miss. Code Ann.* (1972); *Rutland v. Pridgen*, 493 So.2d 952, 954 (Miss. 1986); *White v. White*, 569 So.2d 1181, 1183 (Ms.Ct.App. 1990).

This Court's discussion in *Tritle v. Tritle*, 956 So.2d 369, 374 (Ms.Ct.App. 2007) could have come straight from the *Woodham* record:

When Casi is not at work she is with the two minor children. This indicates a commitment to her children especially during this stressful transition. During the times Park has custody of his children, he requires the assistance of his parents due to his work schedule. It is commendable that the paternal grandparents are willing to assist with the children and take an active role in their lives. Casi's work schedule co-insides [sic] with the children's school schedule. While the Court understands Park must work to support himself and his family, he requires child care assistance and Casi does not.

We believe continuity of care favors the mother.

(3) Parenting skills, willingness and capacity

The Chancellor found this factor favored the father, but allowed the matter of adultery to influence the decision.

Testimony that Amanda is a loving and attentive mother with a close bond to Rachel is found throughout the record, including the Court's findings (R.E. 31, Rec. 113, 205, 249, 256, 324) Prior to this litigation Richie praised Amanda for what she had done as a mother, and apologized for his own shortcomings (Rec. 113). Amanda is far from an unfit parent, and yet does not even share legal custody under the Court's judgment.

While Richie showed an interest in Rachel, at least in preparation for trial, his capacity to provide care for Rachel is severely limited by his erratic work schedule, which is well documented in the record, as well as the Court's findings (R.E. 37, Rec. 352-66). Again, the Chancellor's conclusions are based more on what "Granny" did than on what Richie can do. There is nothing in the record to suggest a lack of parenting skills or unwillingness or incapacity by Amanda to care for Rachel. The Court in *Tritle v. Tritle* addressed an analogous situation, as follows:

Park's remaining assertions center on his capacity to provide child care. According to Park, except during his weekly Friday night line dance, he cared for the children when he was not working. Be that as it may, the children testified that, during the weeks they stayed with Park, their grandmother cooked for them and cleaned their clothes. There was ample testimony that Park relied on his parents to assist with caring for the children due to the demands of his job. Park needed his parents' help with the children because he worked later hours and occasionally had to work overnight shifts. Park also needed his parents' help with caring for the children when Park went line dancing on Friday nights. Casi did not need any assistance in caring for the children.

Tritle at 37

(4) Physical and mental health and age of the parties

The trial court found this factor favored the father.

The trial court found that this factor favored Richie, citing only Amanda's prescribed use of Lexapro and occasional consumption of beer in support.

There being no testimony of any ill effects on Amanda from taking an antidepressant, this factor should have been neutral. This issue was discussed in *Trittle*, Supra, as follows:

The chancellor's found that this factor favored neither party. According to Park, the chancellor should have found that this factor favored him. Park bases his argument on his relatively good physical and mental health and the fact that the evidence showed that Casi once took Paxil for panic attacks.

There was no testimony that Casi's having taken Paxil had any bearing on her ability to care for the children. The simple fact that Casi took Paxil, without more, does not justify our finding that the chancellor was clearly erroneous when she did not find that this factor favored Park.

Trittle, at 376, 77

We believe this factor favors neither parent.

(5) Moral fitness

The trial court found this factor favored the father.

The court found this factor in favor of Richie, solely based on Amanda's adultery. (R.E. 38) Since there is no evidence of any harm to Rachel arising from the adultery, this should be a neutral factor. See Brekeen v. Brekeen, 880 So.2d 280, 284 (Ms.Ct.App. 2004) and cases cited in Section I of Appellant's Argument, Supra. The Chancellor not only penalized Amanda on moral grounds for her adultery, but also found Amanda had "sacrificed" her relationship with her child, thus finding for Richie on "willingness and capacity" to provide parenting. This "double whammy" came in a case where the child had one accidental exposure to the paramour at age two, and where the Chancellor found the child has a close emotional bond with her mother.

We believe this factor favors neither party.

(6) The home, school and community record of the child

The trial court found this factor favored the father.

At age three there is no home, school or community record of a child, and this factor favors neither party. *Webb v. Webb*, 2006-CA—01701, ¶27 (Ms.Ct.App. 2008); *Bellais v. Bellais*, 931 So.2d 665, 670 (Ms.Ct.App. 2006) (approving the Chancellor's finding to this effect without comment).

This factor favors neither party.

(7) Stability of home environment and employment of parents

The Chancellor made a split decision here, finding for Amanda on stability of employment and for Richie on stability of home environment. We believe these factors must be considered together, especially when, as in this case, the work schedule affects the stability of the home environment.

What the Chancellor glosses over is how Richie's erratic work schedule and history of changing employment affects Rachel. She acknowledges the instability of his family, including numerous broken marriages, but does not discuss the detrimental effect that can have on Rachel's home environment. Because Richie has to be at work at 6:30 a.m. he has to get Rachel up at 4:30 a.m. and take her to Ruth Woodham (Rec. 360). If he gets home after Rachel's bedtime, she stays with Mrs. Woodham (Rec. 361). Rachel is now kindergarten age. Rachel may go to bed at Richie's house, then he takes her to Ruth Woodham at 4:30 a.m. the next day. Another person takes her to school (Rec. 361) and yet another picks her up after school (Rec. 361) to return her to Ruth (who doesn't drive). Richie may or may not be at home before her bedtime.

The Chancellor acknowledged Richie "has had highly irregular work schedules" (R.E. 39), but fails to analyze the impact on the stability of Rachel's home environment. This is best illustrated by excerpts from Richie's testimony:

Q Nevertheless, when Rachel is in that school situation and gets home at 3:00, if you're not home until 8:00, you miss a big part of that after school time, don't you?

A Yes.

(Rec. 131)

Q What is the set time for that job?

A On the RJA121, you go in at 6:31 in the morning, which is 0631 a.m. On the RJA311, you go to work at 1800 hours in the afternoon. On the RJA111, you go to work at 0631 a.m. And the RJA211, you go to work at 1400, which would be two o'clock in the afternoon.

Q Okay. So again it varies the time that you have to report?

A The times varies, but that is the established time of that job assignment.

Q Okay. Now, if you have – if you have to be at work at 0630 in the morning, what time do you have to leave Newton?

A I have to leave about 10 minutes to 5.

Q Then minutes to five. All right. Now, typically, where would Rachel be at that time on your weeks?

A I take Rachel to my grandmother's

Q You get her up at what time?

A 4:30, quarter to 5.

Q So are you saying that Rachel is at your house at the trailer?

A Yes.

Q She stays overnight with you in the trailer. You get up at 4 – 4:30?

A I get up at 4:30, quarter to 5.

Q You get her up and take her where?

A To my grandmothers, Ms. Woodham.

Q Okay. So then Ms. Woodham has her until you get back home in the evening.

A Correct.

Q Which could be 12 hours or more.

A It could.

Q It is from time to time?

A Not very frequently, not lately.

Q All right. Now, it's my understanding Rachel will start pre-kindergarten this fall.

A Yes, in August.

Q August of this year. So is it your intention to get her up at 4:30 in the morning and take her to somebody else so she can go to kindergarten?

A No. I will take her to my grandmother.

Q You will take her to your grandmother like you do now. Then somebody will pick her up from there to go to kindergarten?

A Yes.

Q So that – if we look through here at your call times, getting up that early in the morning is pretty normal; is it not?

A Yes.

(Rec. 360, 361)

The effects of such a schedule were significant in the *Tritle* decision, Supra.

Meanwhile, Amanda leaves work at 2:30 or 3:00 p.m. and could spend every afternoon with Rachel and wake her up at a reasonable hour for breakfast every day, then be with her when school is out.

Here is another example of the Chancellor's conclusions, not being supported by the record.

CONCLUSION


We believe a fair reading of the evidence calls for the *Albright* factors to fall out as follows:

- | | | |
|-----|--|---------|
| 1. | Age, health and sex of the child | Mother |
| 2. | Determination of the parent that had the continuity of care prior to separation | Mother |
| 3. | While parent has the best parenting skills and which has the willingness and capacity to provide primary childcare | Mother |
| 4. | The employment of the parent and responsibilities of that employment | Mother |
| 5. | Physical and mental health and age of the parents | Both |
| 6. | Emotional ties of parent and child | Both |
| 7. | Moral fitness of the parents | Both |
| 8. | The home, school and community record of child | Neither |
| 9. | The preference of the child at the age sufficient to express a preference by law | N/A |
| 10. | Stability of home environment and employment of each parent | Mother |
| 11. | Other factors relevant to parent-child relationship | Mother |

Appellant Amanda Woodham respectfully request reversal of the trial court's decision on custody, and that this Court render judgment for joint legal custody, with primary physical custody to Amanda, and remanding the issue of visitation and child support.

Respectfully submitted,

AMANDA WOODHAM
Appellant

BY: 
ROBERT M. LOGAN
Attorney for Appellant


CERTIFICATE OF SERVICE

I, ROBERT M. LOGAN, attorney for Plaintiff/Appellants, do hereby certify that I have this date caused to be delivered, via U. S. Mail, a true and correct copy of the above and foregoing *Brief of Appellant* to the following:

Honorable Thomas Tullos
P. O. Box 567
Bay Springs, MS 39422.

Honorable Janace Harvey-Goree
Special Chancellor 11th District
P.O. Box 39
Lexington, MS 390095-0039

THIS the 11th day of June, 2008.


ROBERT M. LOGAN