

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ERICA ROSE WHEAT

APPELLANT

VERSES

CAUSE NO. 2007-CA-02066

THANASIS G. KOUSTOVALAS

APPELLEE

BRIEF OF APPELLEE THANASIS G. KOUSTOVALAS

APPEAL FROM THE CHANCERY COURT OF
LOWNDES COUNTY, MISSISSIPPI
CAUSE NO.2007-CA-02066

TIMOTHY C. HUDSON
ATTORNEY AT LAW
809 THIRD AVENUE NORTH
COLUMBUS, MISSISSIPPI 39703
TELEPHONE: 662-328-2711
FACSIMILE:662-328-0745
EMAIL: thudson.simsandsims@yahoo.com
MS BAR NO: 2847

ATTORNEY FOR APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 28 (a) of the Mississippi Supreme Court Rules, the undersigned counsel of record certified that the following listed persons have an interest in the outcome of this case:

These representatives are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Erica Rose Wheat, Appellant
2. Thanasis G. Koustovalas, Appellee
3. Stephanie L. Mallette, Attorney for Appellant
4. Timothy C. Hudson, Attorney for Appellee
5. Honorable H.J. Davidson, Chancellor

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STATEMENT OF THE ISSUES

1. Whether the Chancellor erred and abused his discretion in his application of the Albright factors in awarding custody to the father?
2. Whether the Chancellor's Final Order granting custody to the father is in error due to its ambiguity?

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STATEMENT OF THE CASE

Appellee file a petition for paternity and custody on May 6, 2008. Appellant was served and subsequently an Agreed Temporary Order was entered. The case was set for trial on October 17, 2008 and both Parties appeared on said date and announced ready for trial.

The trial was conducted on the aforementioned date. At trial the Mother/Appellant state she lives with her mother, father and two brothers (Trial Transcript Page 7, Line 3-21). She further stated the child is three years of age (T.T.P 7, L 22-23). She stated she had lived with her parents for about 6 months (T.T.P 7, L 24-25). Prior to that she resided at 38 Crews Road for about 4 months (T.T.P 7, L28-29 and T.T.P 8, L 1-2). In her testimony listing her residences during the child's lifetime, she testified she had lived at four separate residences of over the past 2 years (T.T.P 8, L 22-24). The Mother further testified she had a problem with cocaine use and had stopped using on her own three months ago (T.T.P 10, L 23-29 and T.T.P 11, L 1-9). The Mother testified her drug supplier was a convicted drug offender (T.T.P 12, L 8-15). In addition, the Mother testified she had paid fines for disorderly conduct and shoplifting (T.T.P. 12, L 22-

T.T.P 13, L21). At the time of trial, the Mother had six bad checks at the District Attorney's Office (T.T.P15, L 17 - T.T.P 16, L 7)

The Mother acknowledged the Father has enrolled the child in daycare three to four nights per week (T.T.P 16, L 16-29). The Mother testified the child has some breathing problems and admitted his Medicaid coverage lapsed due to her relocations (T.T.P 19, L 8 - T.T.P 20, L 13).

The Father/ Appellee testified the Parties lived together for a year after the birth of their child (T.T.P 61, L 19-21). He further testified the child spent approximately fifty percent of the time with the Father over the past year (T.T.P 62, L 23-26) and every weekend since the Temporary Order although this ordered only gave the Father every other weekend (T.T.P 65, L 6-13).

The Father is married and lives with his wife in a three bedroom home (T.T.P 65, L 16-23). The Father has worked as a jet re-fueller and security guard at Columbus Air Force Base for the past two and one-half years (T.T.P 65, L 25 - T.T.P 66, L 12). The Father passed a stringent background check, is in good health and does not use legal or illegal drugs (T.T.p 69, L 8-29).

The Father further testified he provides the necessary care for the child when the child is in the care of the father (T.T.P 70, L7-26).

After hearing the testimony and considering the evidence, the Court issued a written Opinion on November 21, 2008. In said Opinion, the Court applied the Albright factors and found that it would be in the best interest of the child to be in the custody of the Father. Since paternity was not contested, the Court found the Appellee to be the Father of the minor child.

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SUMMARY OF THE ARGUMENT

- I. The Chancellor properly evaluated the Albright factors and the Chancellor's decision is supported by the evidence.
- II. The Chancellor's order is not clear and not ambiguous.

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ARGUMENT

I. STANDARDS OF REVIEW

The case of *Herring Gas Co. v. Whiddo*, 626 So.2d 892, 894 (Miss. 1993), reiterated the axiom that “The findings of the Chancellor will not be disturbed when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” In *Kilpatrick v. Kilpatrick*, 732 So.2d 876, 880 (Miss. 1999), the Court reiterated that particularly in the domestic relations area the Supreme Court will not overturn the trial court on appeal unless its rulings were manifestly wrong. *Kilpatrick*, 732 So.2d 888 (Miss. 1999), citing *Mazelle v. Mazelle*, 708 So.2d 55, 64 (Miss. 1998), quoting *Tilley v. Tilley*, 610 So.2d 348, 351 (Miss. 1992). Stated differently, the Supreme Court is not going to reverse a Chancellor in a trial on conflicting evidence unless he has abused his discretion or made a finding that is manifestly wrong.

II. THE TESTIMONY BEFORE THE COURT WHEN VIEWED UNDER THE TOTALITY OF THE CIRCUMSTANCES AND EVALUATED UNDER ALBRIGHT FACTORS WARRANTS CUSTODY OF THE MINOR CHILD BEING PLACED WITH THE FATHER.

The polestar considered in child custody cases is the best interests and welfare of the child. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). *Albright* sets out factors that should be considered in making a custody determination. The Chancellor correctly considered each factor and stated his findings.

1. Age, sex and health of child:

The Chancellor found this factor to favor the father due to the child's health issues and the Mother allowing medical coverage to lapse. The Mother contends while the "tender years doctrine" has been weakened, there is still presumption that a Mother is better suited to raise a young child. *Hollon v. Hollon* 784 So.2d 943 (Miss. 2001). In *Hollon* the judge did not explicitly say this factor favored either party and this Court found this factor favored the Mother due to the aforementioned presumption. In the case before the Court, the trial judge stated the child is three years old, male but goes on to explain his reasoning as it relates to the negligent handling of the health coverage of the child. Appellee also points out the case of *Webb v. Webb* 974 So.2d 274 (Miss. 2008) which states this (age) should probably slightly favor the Mother unless an explanation is otherwise given. *Webb* cites *Law v. Law* page 618 so.2d 96, 101 (Miss. 1993) where our Supreme Court held that "the tender years doctrine seems less controlling, especially when considering the child's male gender".

2. Continuity of Care Prior to the Separation:

The Court found this factor to slightly favor the Mother because the Mother has the child four nights per week and the Father three. Under the aforementioned Standard of Review the Appellee cannot say the Chancellor was clearly in error or manifestly wrong.

3. Parenting Skills:

Under the applicable Standard of Review the Appellant cannot challenge this finding.

4. Employment of the Parent and Responsibilities of that Employment:

The mother disagrees with the Chancellor's that this factor favored neither because they have basically the same schedule. The main objection seems to be that a step-mother will be providing care rather than a maternal grandparent. The Appellee points out that the maternal grandparent did not testify at trial nor the step-mother and there was no opportunity for the judge to consider whether one would be better than the other.

5. Physical and Emotional Fitness and Age of the Parents:

The Appellee argues that the Father "cheating" on a person he was never married to renders him emotionally unfit. There is nothing in the record to support any physical or emotional instability on the part of the Father. The Chancellor found that the Mother's arrest for an altercation at the Father's home demonstrated some lack of emotional control and therefore correctly found this factor slightly favored the Father.

6. Emotional Ties of Parent and Child:

Under the Applicable Standard of Review, the Appellant cannot challenge the Chancellor's findings.

7. Moral Fitness of Parents:

The Appellants accuses the judge of punishing the Mother for her past indiscretions and states that nothing is mentioned about the father having good moral fitness. The obvious reason is because there is nothing in the record to indicate any deficiency in the Father's moral fitness short of the inference that he "cheated" on a woman he was never married to some two years ago. The Chancellor's concern, and rightfully so, was the Mother's conviction for disorderly conduct and the use of cocaine and passing several bad checks during three months while this case was set for trial. This recent conduct concerned the Chancellor and supported his deciding this factor on favor of the Father.

8. Home School and Community Record of the Child:

The Court found both parties deliver and pick up the child from daycare but that the Father bore all cost related to same. There being no paternity established at this time, the actions of the Father were completely voluntary and done solely for the best interest of the child. The Chancellor was justified in finding this factor slightly favored the Father.

9. The Preference of the Child at an Age Sufficient to Express a Preference by Law:

Both Parties concede the judge was correct in this finding.

10. Stability of the Home Environment:

The Appellant rehashes her previous argument that blood relatives are better suited to be around a child. Appellee again points out there was nothing presented before the trial court to properly evaluate the relationship of the child and his "blood relatives". What was presented was the Father has his own home with ample room and the Mother has relocated at least 4 times in two years and presently is dependent on her parents in providing a home which is occupied by six

people. Further, the child does not have his own room but sleeps with his mother (T.T.P 114, L 3-14). The justification for favoring the Father is supported by the testimony.

11. Other Factors Relevant to the Parent-Child Relationship:

The record does not support any basis that the Father's brother, who is a convicted felon, is not rehabilitated, is present when the child is in the grandmother's home for one to two hours per day or that the uncle takes any part in supervising the child. Further, the Appellant make the statement the judge should have considered the Father and grandmother smoking "around" the child. The Appellant does not point to any testimony in the record to support this allegation. The Appellee points out there is testimony that neither the Father nor the grandmother smokes around the child (T.T.P 83, L 29 - T.T.P 84, L 1-5).

The remainder of this argument is conclusory and substitutes the judgement of a biased Party for that of an unbiased judge.

III. WHETHER THE CHANCELLOR'S FINAL ORDER GRANTING CUSTODY TO THE FATHER IS IN ERROR DUE TO IT AMBIGUITY:

The Appellant cites no authority supporting her position that the use of the word "custody" in a Court order is ambiguous. Albright itself does not differentiate as to custody and in fact uses the word "custody" in its holding and rationale. A quick review of the numerous cases decided by this Court finds no instance when "legal custody" was used in Albright evaluation reviews. The Appellee takes the position custody means complete custody unless otherwise specified.

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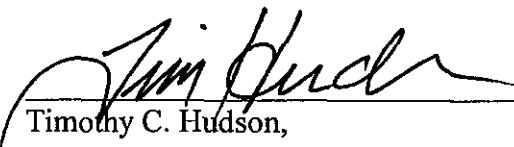
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CONCLUSION

When using the Standard of Review that Chancellor's findings will not be disturbed when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied, it is clear and uncontested, the proper legal standard was applied, and it is equally clear there is no abuse of discretion or error in the application of the Albright factors. The Chancellor's reasoning on each factor is set out in his opinion and it is not this Court's place to second guess his reasoning absent a showing of abuse of discretion or clear error.

Respectfully Submitted:



Timothy C. Hudson,
Attorney for Appellee

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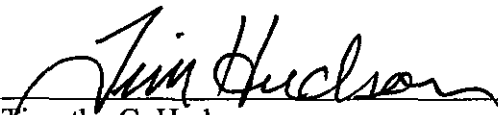
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When using the Standard of Review that Chancellor's findings will not be disturbed when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied, it is clear and uncontested, the proper legal standard was applied, and it is equally clear there is no abuse of discretion or error in the application of the Albright factors. The Chancellor's reasoning on each factor is set out in his opinion and it is not this Court's place to second guess his reasoning absent a showing of abuse of discretion or clear error.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have on this day mailed, postage prepaid, a true and correct copy of the foregoing Brief Appellee to the Honorable Stephanie L. Mallette, Attorney for Appellant, at Post Office Box 80170, Starkville, MS 39759-0170, Honorable H.J. Davidson, Chancellor, Post Office Box 684, Columbus, MS 39703 and Ms. Kathy Gillis, Clerk Mississippi Supreme Court, Post Office Box 249, Jackson, MS 39205-0249.

Respectfully Submitted:



Timothy C. Hudson,
Attorney for Appellee

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Timothy C. Hudson,
Attorney for Appellant