

IN THE SUPREME COURT OF MISSISSIPPI

JULIE D. JONES

APPELLANT

VERSUS

NO. 2008-CA-00035

DONALD G. JONES

APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT IS NOT REQUESTED


CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. Julie Daley Jones, Appellant  
5 Caley Circle  
Purvis, Mississippi 39475
2. Donald Glenn Jones, Appellee  
45 Davis Lane  
Carson, Mississippi 39427
3. Honorable Joe Dale Walker, Chancellor  
Chancery Court of Jefferson Davis County  
Thirteenth Chancery Court District  
517 E. Broad Street, 2<sup>nd</sup> Floor, P.O. Box 909  
Monticello, Mississippi 39659-0909  
Telephone: (601) 587-2997  
Facsimile: (601) 587-2999
4. Honorable Harry R. Lane, Counsel for Defendant/Appellant  
Mississippi Center for Legal Services Corp.,  
111 E. Front Street, P.O. Drawer 1728  
Hattiesburg, Mississippi 39403-1728  
Telephone: (601) 545-2950  
Facsimile: (601) 545-2935

5. Honorable April Taylor, Counsel for Plaintiff/Appellee  
Attorney at Law  
1109 Third Street, P.O. Box 1526  
Prentiss, Mississippi 39474  
Telephone: (601) 792-2529  
Facsimile: (601) 792-2519

So Certified on the 4<sup>th</sup> day of June, A.D., 2008

  
Harry R. Lane, MS Bar No. [REDACTED]  
Attorney for Appellant  
Mississippi Center for Legal Services Corp.  
111 E. Front Street, P.O. Drawer 1728  
Hattiesburg, MS 39403-1728  
Telephone: (601) 545-2950  
Facsimile: (601) 545-2935

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES.....	i, ii
TABLE OF CONTENTS.....	iii
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1-4
Procedural Posture, Nature of the Case and Course of the Proceedings Below.....	1-2
Statement of Relevant Facts.....	3-4
SUMMARY OF THE ARGUMENT.....	4-5
ARGUMENT.....	5-10
1. Whether the chancellor improperly considered and misapplied the <i>Albright</i> factors when he failed to consider or evaluate the mental and physical health and age of the parents and cited parenting skills as first neutral between the parties, then later holding in favor of the father due to the mother's perceived moral unfitness.....	5
Rule of Law.....	5
Relevant Facts.....	6
2. Whether the chancellor abused his discretion in applying too much weight to the single <i>Albright</i> factor of the mother's moral fitness and disregarded other evidence relating to other factors that should have been in the mother's favor in determining custody of the minor child of the parties.....	6
Rule of Law.....	6
Relevant Facts.....	7-9
CONCLUSION.....	10

## TABLE OF CASES, STATUTES AND AUTHORITIES

### CASES

<i>Albright v. Albright</i> , 437 So.2d 1003, 1005 (Miss. 1983).....	5, 7, 9
<i>Bergan v. Bergan</i> , 356 N.E.2d 673, 676 (5 <sup>th</sup> Dist. 1976).....	7
<i>Brekeen v. Brekeen</i> , 880 So.2d 280, 286-287 (Miss. 2004).....	7
<i>Carr v. Carr</i> , 480 So.2d 1120, 1123 (Miss. 1985).....	7, 9
<i>Cheek v. Ricker</i> , 431 So.2d 1139, 1144 (Miss. 1983).....	7, 9
<i>Hollon v. Hollon</i> , 784 So.2d 943, 946 (Miss. 2001).....	5, 6, 7
<i>Marshall v. State</i> , 584 So.2d 437, 438 (Miss. 1991).....	9
<i>Murphy v. Murphy</i> , 797 So.2d 325 (Miss.Ct.App. 2001).....	5
<i>Nardone v. United States</i> , 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939).....	9
<i>Norman v. Norman</i> , 962 So.2d 718, 721 (Miss.Ct.App. 2007).....	5
<i>Roberson v. Roberson</i> , 370 So.2d 1108, 1011 (Ala.Civ.App. 1979).....	7
<i>Rippon v. Rippon</i> , 381 N.E.2d 70, 73 (1978).....	7
<i>Tanner v. Tanner</i> , 956 So.2d 1106, 1108 (Miss.Ct.App. 2007).....	5
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	9

### STATUTES

Uniform Child Custody and Jurisdiction Enforcement Act, Miss.Code Ann. § 93-27-201...4

### AUTHORITIES

<i>Corpus Juris Secundum on Divorce</i> , 27C C.J.S. Divorce § 1005.....	7
--	---

## STATEMENT OF THE ISSUES

1. Whether the chancellor improperly considered and misapplied the *Albright* factors when he cited parenting skills as first neutral between the parties, then later holding in favor of the father due to the mother's perceived moral unfitness.
2. Whether the chancellor abused his discretion in applying too much weight to the single *Albright* factor of the mother's moral fitness and disregarded other evidence favorable to the mother in determining custody of the minor child of the parties?

## STATEMENT OF THE CASE

Procedural Posture, Nature of the Case and Course of the Proceedings Below.

This matter is on appeal from a Final Judgment of Divorce rendered on October 8, 2007, and a Denial of a Motion for Reconsideration rendered on December 5, 2008, in the Chancery Court of Jefferson Davis County, Mississippi, Thirteenth Chancery District, the Hon. Joe Dale Walker, Chancellor, presiding.

Plaintiff/Appellee, Donald Glenn Jones (hereinafter "Don"), filed for divorce in the Chancery Court of Jefferson Davis County, Mississippi, on March 28, 2007, against Defendant/Appellant, Julie Lynn Daley Jones (hereinafter "Julie"), alleging as grounds therefore uncondoned adultery and habitual cruel and inhuman treatment and, in the alternative, irreconcilable differences. Julie filed an Answer and Counterclaim for Divorce on May 9, 2007, asserting the affirmative defenses of recrimination and condonation, and alleging grounds of uncondoned adultery, habitual cruel and inhuman treatment and, in the alternative, irreconcilable differences. Don filed an Answer to Defendant's Counterclaim on May 23, 2007.

On June 5, 2007, the parties appeared for a Temporary Hearing at the Lawrence County Chancery Court at Monticello, Mississippi. The parties ultimately agreed to a temporary order awarding temporary joint legal and physical custody of the minor child to the parties; awarding the exclusive use and occupancy of the marital domicile to Julie until June 30, 2007, at which time she would relocate to her mother's residence in Hattiesburg; that the child would continue enrollment in Prentiss Christian School, a private school in Jefferson Davis County which the child had been attending since starting school, and the Chancellor specified that this would not be considered adversely against either party in any following consideration of custody; awarding alternate visitation with the minor child; and, setting the matter for trial on August 21, 2007, which agreement was announced to the Chancellor in the parties' presence and which the Chancellor questioned the parties as to their satisfaction with the temporary agreement.

The parties appeared for trial on August 21, 2007, and announced ready for trial, but dropped the contested grounds for divorce and agreed to a divorce on the grounds of irreconcilable differences and agreed to a division of property, but consented to the remaining issues of custody, visitation and support for the minor child to be decided by the Court after a trial on the merits of those issues. The hearing proceeded and the Court heard from seven (7) witnesses besides the parties. The Court took the matter under advisement after the trial on the merits and issued a temporary order of visitation awarding temporary physical custody of the minor child to Don, due to the fact of school starting and the Court wishing the child to remain in the private school in Jefferson Davis County, until the court rendered judgment on the issues of custody, visitation and support.

The Chancellor rendered judgment on October 8, 2007, wherein he awarded primary physical custody of the minor child to Don and set support and established a schedule of visitation for Julie. The Chancellor held that the *health, sex and age* as neutral since Samantha was ten years old (TR, 250, at 19-22); that the *continuity of care* was neutral since the parties equally cared for Samantha (TR 250, at 23-27); that the *best parenting skills* favored neither party as both parents exhibited good parenting skills (TR 250, at 28, through 251, at 1); that both parents have the *willingness and capacity* to provide for the minor child but, that the factor favors Don because of Don's flexible work schedule and his continuing to reside in the marital home and the availability of his family and the fact that Julie was residing in her mother's home in Hattiesburg (TR 251, at 2-16); that the *employment of the parents and responsibilities* of employment were neutral as both parties testified that their employers were flexible in that (TR 251, at 16-20); that the *emotional ties* favored neither parent (TR 251, at 20-22); that *moral fitness* favored Don more as the chancellor perceived that "Julie on two occasions met people on the internet and on one occasion left to Rhode Island to live with that man, then Julie went to England to stay with people she met on the internet and came home with a nude drawing of herself, that she resided in Steve's house while there" (TR 251, at 22, through 252, at 10); that Samantha's *preference* was inapplicable since she was only ten years old; that the *stability of home environment* favored Don since Samantha would remain in the family home, attend her school and stay close to her relatives, that if Samantha lived with Julie that she would live in Julie's mother's home in Hattiesburg and would be uprooted from her surroundings and would be uprooted again when Julie secured her own housing (TR 252, at 25, through 253, at 6); and, the Chancellor's twelfth factor, that *parenting and parent/child relationship* factor favored Don, again, since the Chancellor was concerned about his perception of Julie's use of the internet to meet people, and her supposed spur of the moment decisions to pick up and go meet them, taking Samantha on vacation to England to meet people she had only met on the internet, residing in the host family's home, letting Samantha stay with other family members she had just met, that Julie took off to Rhode Island and left her husband and child to live with this man, that Julie said she did not know if she would do it again, that the Chancellor was concerned what would happen to Samantha if Julie took off to far away places to meet someone she only knew through the internet or if they came to her home and that he didn't feel it was in the best interest of Samantha (TR 253, at 6, through 254 at 6). Julie filed a Motion for Reconsideration on October 19, 2007, addressing all *Albright* factors and the Chancellor's inconsistency in addressing those factors, which motion was overruled by the Chancellor on December 5, 2007. This appeal follows that denial.

## Statement of Relevant Facts

Don and Julie began dating in early 1996 and married on August 10, 1996. Of that marriage one child was born, namely Samantha Elizabeth Jones (hereinafter "Samantha"). The parties made a home in Jefferson Davis County. Julie stayed at home with Samantha for the first three years of her life, believing that a small child needed to be with a parent for their first formative years.

The parties filed a Joint Complaint for Divorce on September 10, 2001, citing irreconcilable differences, which was filed in the Chancery Court of Jefferson Davis County, Mississippi. Julie testified that the marriage was untenable due to Don's emotional aloofness to her, his emotional distance with Samantha, the interference of Don's family in their affairs and his refusal to support her in disagreements with them. The divorce papers filed provided for Don to maintain the family residence and to have custody of Samantha. After the filing Julie moved from Mississippi to Rhode Island to meet a man she had previously met through an internet web-site. Julie stayed with this person for several weeks, then discontinued the relationship, secured her own separate housing and was working to support herself. Julie had been in Rhode Island approximately two months when she agreed to Don's requests to move back to Mississippi and continue their marriage. Don personally went to Rhode Island to retrieve Julie. The previously filed irreconcilable divorce was dismissed soon after Julie's return.

Once back in Mississippi, Don and Julie resumed the intimate marital relationship for approximately another six years.. Julie and Don were both working, sometimes on alternating shifts. They maintained separate checking accounts with Don paying the major bills for the mortgage and Julie paying for the family food, utilities and Samantha's needs. Julie resumed the primary lead of caring for Samantha, getting her up in the morning, getting her dressed, preparing her breakfast and getting her to day care in the years prior to Samantha starting school. This pattern continued after Samantha started school. The parties relied on Don's family in the area to assist in caring for Samantha after school hours when work schedules made one of the parents unavailable. This pattern continued even after Julie began working at a job which required her to work from the late morning or early afternoons through the evenings. While the parties would share some of the housework at times, it was primarily Julie getting Samantha to school and to day care when she was not in school. Don would go to work and then do mechanic work most nights in his shop behind the marital home.

The problems which were at the core of the split between the parties in 2001 continued after Julie's return. Julie testified that her relationship with Don's family was strained at best after her return, regardless of her efforts to be a participating member of the family. The relationship continued to be strained also between the parties for the reasons earlier stated and Julie was becoming frustrated at having to work the hours she worked and having to do the majority of caring for Samantha with little help from Don.

Beginning sometime in 2004, Julie met and became acquainted with Steve Ashton (hereinafter "Steve"), and his family from England in an internet chat-room. They shared an interest in art with Julie and they corresponded often in the chat room and became well acquainted. Julie, Don and Samantha all corresponded in the chat room with the Ashton family for several years.

Julie was frustrated by Don going to work and leaving her to get Samantha up and ready for school even though she didn't have to be at work until the late morning hours so, beginning sometime in 2005, Julie put her foot down and demanded that Don take a more hands-on part in helping to care for Samantha. Since Julie was working late in the mornings and late into the night on most nights, Don reluctantly agreed to begin getting Samantha up and to school when he was going to work. After school, Samantha would go to Julie's job and stay there with her until Don would get off of work or another member of Don's family could pick her up.

The Ashtons invited Julie and her family to take a vacation and visit them during the summer of 2006. Plans were made between Julie and Don that each would pay for their own passports and tickets for the flights and Julie would pay for Samantha's. When the time came for final arrangements for the trip, Don declined to get his passport or his ticket and refused to go. Julie and Samantha went on vacation as planned in July of 2006. During the trip Julie stayed in the Aston home with Steve and his wife and Samantha stayed with other family members nearby who had a daughter approximately the same age as Samantha. Don was aware of and agreed to these plans prior to Julie and Samantha leaving on the trip. Steve is an artist and wished to paint a portrait for Julie to have during the trip. Julie provided Steve with a photo of herself for the portrait prior to the trip. Don was aware that Steve was painting this portrait prior to Julie leaving for England. On arrival in England, Julie found that the portrait painted by Steve was in the classical mode of a reclining nude, with Julie's face superimposed on it. Julie found the portrait to be in good taste and not of a prurient nature.

After the return from the trip to England, Julie advised that the relationship became even more strained as Don and other family members began making allegations that the relationship between Steve and Julie was more than friendship. Julie considers Steve and his wife close friends, but that there was nothing more than friendship and that nothing happened between them during the vacation to England.

Don and Julie were still together and still engaged in the intimate marital relationship up to the date that she was served with the divorce complaint at her job, contrary to Don's allegations in his pleadings that the parties had been separated since March 8, 2007. Don and Julie were together the night before she was served. In his pleadings in the required reporting for the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), Miss.Code Ann. § 93-27-201, et seq., Don omitted reporting the previous divorce action in 2001, even though the parties both participated in the action.

#### SUMMARY OF THE ARGUMENT

When analyzing the *Albright* factors and upon hearing the testimony given in open court, the chancellor committed manifest error and/or an abuse of discretion in that he improperly considered and misapplied the factors related to the factors annunciated in *Albright* in that he cited parenting skills twice, first holding the factor as neutral between the parties, then, later holding it in favor of Don.

The chancellor committed manifest error and/or abuse of discretion when he awarded custody of the parties' minor child to Don with the determinative factor being based in large part on his perception of Julie's moral unfitness and his perceived fears of harm to the child in the future when there was no evidence presented of an adverse effect on the child and no evidence of a probability of the reoccurrence of the perceived immoral conduct in the future.

## ARGUMENT

1. Whether the chancellor improperly considered and misapplied the *Albright* factors when he cited parenting skills as first neutral between the parties, then later holding in favor of the father due to the mother's perceived moral unfitness.

### Rule of Law

Appellate courts will not disturb the findings of a chancellor unless an abuse of discretion, an erroneous application of the law, or manifest error is found. Thus, if there is substantial evidence in the record to support the chancellor's findings, the findings will not be reversed. *Tanner v. Tanner*, 956 So.2d 1106, 1108 (Miss.Ct.App. 2007). 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). In child custody cases, an appellate court must give deference to the chancellor's determination of the weight and credibility of the evidence and may not substitute its judgment for the chancellor's, but must determine if the chancellor's ruling is supported by substantial evidence. *Norman v. Norman*, 962 So.2d 718, 721 (Miss.Ct.App. 2007). An appellate court must find a chancellor in error where the chancellor improperly considers and applies the *Albright* factors. *Tanner*, Id., *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). In determining whether the chancellor abused his discretion in applying the *Albright* factors, the appellate court reviews the evidence and testimony presented at trial under each factor to insure the chancellor's ruling was support by the record. *Tanner*, Id.

The *Albright* factors used to determine what is, in fact, the best interest of a child in regard to custody are as follows: 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 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 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 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. *Albright*, 437 So.2d at 1005. Specific findings of fact on each factor are preferable. *Murphy v. Murphy*, 797 So.2d 325 (Miss.Ct.App. 2001).

## Relevant Facts

Here, the chancellor cited as factors in his decision: 1) health, sex and age (TR 250, at 18); 2) continuity of care (TR 250, at 23); 3) best parenting skills (TR 250, at 28); 4) willingness and capacity to provide (TR 251, at 2); 5) employment of the parents and responsibilities of employment (TR 251, at 16); 6) emotional ties (TR 251, at 20); 7) moral fitness (TR 251, at 22); 8) the home, school and community record (TR 252, at 11); 9) preference (TR 251, at 21); 10) stability of home environment (TR 252, at 25); and, 11) parenting and parent/child relationship (TR 253, at 6).

In his ruling awarding custody to Don, the Chancellor held that the best parenting skills favored neither party as both parents exhibited good parenting skills (TR 250, at 28, through 251, at 2); and, later, that parenting and parent/child relationship factor favored Don, *again* (emphasis mine), since he was concerned about his perception of Julie's use of the internet to meet people, who she gains trust in, and on the spur of the moment picks up and go meet them, taking Samantha on vacation to England for two weeks to meet people she had only met on the internet, residing in the host family's home, letting Samantha stay with other family members she had just met, that after filing for divorce in 2001, Julie went to Rhode Island and left her husband and child to live with this man, that Julie said she did not know if she would do it again, that the Chancellor was concerned what could happen to Samantha and Julie if Julie took off to far away places to meet someone she only knew through the internet or if they came to her home and that he didn't feel it was in the best interest of Samantha (TR 253, at 6, through 254 at 6).

The chancellor clearly improperly considered and misapplied the *Albright* factors when he stated early in his ruling that the best parenting skills favored neither party because they both "exhibited good parenting skills with the child and no one testified differently." (TR 250, at 27, through TR 251, at 2), then, later, when he stated that the twelfth factor of parenting and parent/child relationship favored Don, *again* (emphasis mine), and then proceeded to admonish Julie for his perceptions of her shortcomings and bad decisions as a parent. The chancellor cannot hold in one breath that the parties share equal stature in parenting skills, then later hold the same factor against one party. An appellate court is obliged to find the chancellor in error when he improperly considers and applies the *Albright* factors and then must re-evaluate the record to determine if there is substantial evidence in the file to support his ruling. *Hollon*, 784 So.2d at 946.

2. Whether the chancellor abused his discretion in applying too much weight to the single *Albright* factor of the mother's moral fitness and disregarded other evidence relating to other factors that should have been in the mother's favor in determining custody of the minor child of the parties.

## Rule of Law

The fact of misconduct or fault alone does not disqualify a parent from custodianship but the polestar consideration in original custody determinations is the best interest and welfare of the minor child. Moral fitness encompasses misconduct on the part of a party. But moral fitness is but one factor to be considered, and it is a factor worthy of weight in determining the best interest of a child. Misconduct 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. Trial courts should consider this factor along

with all others when making original custody determinations, but fault should not be used as a sanction in custody awards. *Albright*, 437 So.2d at 1005, *Carr v. Carr*, 480 So.2d 1120, 1123 (Miss. 1985). One factor should not outweigh another. *Brekeen v. Brekeen*, 880 So.2d 280, 286-287 (Miss. 2004). The moral unfitness of a parent may be considered in a custody case, as long as it has a direct bearing on the child's welfare. "[A] mother will not be denied custody for every act of indiscretion or immorality", especially where no detrimental effect on the welfare of the child has been shown. *Hollon*, 784 So.2d at 949-950, citing *Roberson v. Roberson*, 370 So.2d 1108, 1011 (Ala.Civ.App. 1979), and *Rippon v. Rippon*, 381 N.E.2d 70, 73 (1978). Cohabitation is relevant only to the extent it can be shown to adversely affect the child. *Cheek v. Ricker*, 431 So.2d 1139, 1144 (Miss. 1983).

Prior instances of misconduct do not necessarily require the denial of custody, especially where there is no showing that future misconduct is probable. *Corpus Juris Secundum on Divorce*, 27C C.J.S. Divorce § 1005; *Bergan v. Bergan*, 356 N.E.2d 673, 676 (5<sup>th</sup> Dist. 1976).

### Relevant Facts

The trial record of the chancellor's ruling covers twelve pages, from page 244 to page 256, each page consisting of twenty-nine (29) lines of text. Of those twelve pages, the chancellor devotes almost four pages of the trial record to his evaluations of the *Albright* factors, beginning on line seventeen (17) of page 250, to line six (6) of page 254, a total of one-hundred five (105) lines and approximately three point-six (3.6) pages of the record. Of those 105 lines, the chancellor devotes forty-seven (47) lines, or approximately forty-four (44%) per cent of the ruling, almost two whole pages, to his evaluation of his perception of Julie's moral unfitness under his evaluations of the two factors of best parenting skills and parenting and parent/child relationship, leaving fifty-eight (58) lines, two pages, or approximately sixty-six (66%) percent of the ruling, for evaluation of the remaining nine (9) factors he annunciated, an average of six point-four (6.4) lines for each other factor, several of which evaluations occupied little more than one line of text.

In *Brekeen*, the chancellor devoted three and a half (3.5) pages of the five (5) page evaluation of the *Albright* factors to the wife's moral fitness and the other factors affecting the parent/child relationship. There, the wife was found at fault in the marriage due to uncondoned adultery. In *Hollon*, the chancellor centered his evaluation of the *Albright* factors almost entirely on the wife's alleged homosexual affair, and omitted evaluation of the remaining factors.

Here, the chancellor zeros in on Julie's meeting of people on the internet and the two incidences of her personally going to meet people she has met. One of those incidents involved her leaving Mississippi after Don and Julie had filed a joint complaint for divorce in 2001. Don omitted listing the prior divorce action in the mandatory reporting section of the complaint required by the UCCJEA (CR at 5-9, TR 87, at 2, through TR 88, at 7), and further denied the existence of that complaint under oath until presented with the official court file of that complaint during the trial (TR 87, at 2, through TR 88, at 8). In deciding to go to Rhode Island, Julie testified that she believed that her marriage to Don was over (TR 142, at 8-13, TR 230, at 7-13). She further testified that she was there only for a total of two months and, soon after arriving and meeting this person, discontinued the relationship, found alternate housing and was working to support herself (TR 159, at 24). The chancellor overlooks or refuses to recognize that this incident occurred nearly six years prior to Don filing for divorce and, further, that Don himself requested that Julie return to Mississippi and resume

the marital relationship, which she did, and that Don himself went to Rhode Island to get her (TR 120, at 13-19). Don and Julie then continued in the marital relationship for another six years, until Don served Julie with the divorce complaint at her job and she then found out that she had allegedly been separated for three weeks from the husband she had slept with the night before (TR 160, at 19-20, TR 161, at 1-13).

The second incident the chancellor zeroes in on is Julie's vacation to England in July of 2006. The chancellor perceives this vacation as a bad decision on the part of Julie to go meet people she had only previously met on the internet. It is axiomatic that the internet now permeates daily life and has had a massive impact on international social interaction. The daily interaction of many peoples from many countries, and the development of friendships through that interaction, is now commonplace. Julie testified that she met Steve and his family beginning sometime in 2004 and cultivated a relationship with them for several years (TR 11, at 14-24). She further testified that Don was aware of this relationship and participated in conversations with Steve and his family (TR 85, at 25-27 TR 108, at 27-29). Julie testified that the trip to England was planned as a family vacation and that Don and Julie had agreed on who was going to pay for the passports and tickets (TR 144, at 25, through TR 149, at 10). Don admitted this on cross-examination (TR 91, at 5, through TR 94, at 3). Julie testified that the arrangements for housing during the trip were discussed and planned prior to the trip and Don was aware of them (TR 158, at 4-16). Julie testified that Don did not secure his passport or his ticket for the trip (TR 145, at 2-8). The chancellor was further concerned about the nude portrait painted by Steve and presented to Julie during the trip. The record shows that Don and Julie were aware that Steve was painting a portrait prior to the trip, had shown them working sketches of it, and had shown them the finished product prior to Julie leaving on the vacation (TR 146, at 19, through TR 147, at 24).

The chancellor expends almost half of his entire ruling and evaluation of the *Albright* factors on his perception of the moral fitness of Julie, his perception of her actions as misconduct and shortcomings as a parent and wife, and his concerns for his perception of dangers to Samantha and similar actions in the future. The chancellor completely overlooks, or refuses to recognize, the voluminous evidence favorable to Julie, citing only what he found in favor of Don. He further overlooks, or refuses to recognize, that the actions in 2001 followed the parties' filing a joint complaint for divorce, that Don failed to report the prior complaint in his complaint and then denied knowledge of it under oath until presented with the court file while on the stand. Further, the chancellor ignores the fact that Julie returned and resumed the marital relationship at Don's request for approximately another six years. Whatever fault that may have been applied to Julie's actions was clearly condoned by Don and should have been attenuated from consideration of the *Albright* factors.

Counsel for Julie can find no reported case in the Mississippi record evincing the theory of attenuation in considerations of misconduct or fault related to considerations of *Albright* factors in determining custody. The issue appears to be *Res Nova*. The theory of attenuation was developed in cases involving questions of admissibility of evidence and 'fruit of the poisonous tree' where there had been misconduct or error of government agents in securing evidence. Attenuation attaches where subsequent evidence is developed after the misconduct or error of the agent and removes the

'taint' of the earlier misconduct or error from consideration of the admissibility of the subsequently developed evidence. Thus, the earlier 'taint' is *attenuated* from the later development of evidence (emphasis mine). *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), cited in *Marshall v. State*, 584 So.2d 437, 438 (Miss. 1991).

While this case does not consider the admissibility of evidence, Counsel for Julie believes that, if attenuation can be a consideration of separating the misconduct or error of government agents in criminal trials, where a citizen's freedom is at stake, certainly a Chancery Court could consider attenuation of a party's alleged past actions, and the period intervening, to the consideration of the *Albright* factors, especially where there is evidence of condonation of that conduct. There should be some reasonable expectation that a party's past actions will not arise like a Phoenix much later to adversely effect present day considerations.

The testimony further clearly establishes that the vacation to England was absolutely innocent. The trip was planned as a family vacation, Julie and Don agreed on who was to be responsible for securing passports and tickets and the arrangements for housing during the trip were discussed and agreed upon. At the last minute, Don did not go. Julie took Samantha on vacation as planned and returned. Julie and Don knew beforehand that Steve was painting a portrait of her from drawings they had been previously shown and the portrait was completed before Julie left for England. Any suspicion regarding illicit conduct during the trip was purely a matter of speculation by Don and his family as a weapon to be used against Julie. There was no evidence presented whatsoever that could possibly be interpreted as relevant and probative of any conduct on Julie's part during the vacation that could be deemed inappropriate.

Finally, there was no evidence whatsoever presented by any witness for Don that there was any adverse effect whatsoever on Samantha regarding Julie's actions. There was no evidence presented regarding the possibility of future conduct which might cause concern. Indeed, at TR 232, at 15, through TR 233, at 2, the chancellor directly asks Julie if there is a possibility of her taking Samantha off and going to visit someone she had just met on the internet and Julie responded that she didn't think so, in direct contravention of the perception of the chancellor in his ruling.

The chancellor clearly applied too much weight to a single factor in applying almost half of his ruling to his perception of Julie's moral fitness and is punishing Julie and using his perception of her past misconduct or fault as a sanction against her in this custody award. *Albright*, 437 So.2d at 1005, *Carr*, 480 So.2d at 1123, and *Cheek*, 437 So.2d at 1144.

## CONCLUSION

For the reasons set forth herein above, Appellant, Julie Daley Jones, respectfully submits that the custody judgment entered and at issue be declared invalid and overturned. The chancellor committed an abuse of judgment, an error of law, and/or manifest error by improperly considering and applying the *Albright* factors in his determination of custody between the parties and overlooked and/or failed and refused to consider the voluminous evidence favoring Appellant presented at trial. Further, the chancellor committed an abuse of discretion when he applied too much weight to the factor of moral fitness regarding the alleged past fault or misconduct of Appellant in his consideration of the *Albright* factors, and his ruling awarding custody of the minor child to Appellee essentially punishes Appellant what the chancellor perceives as her past misconduct or fault. Finally, the chancellor overlooked or failed and refused to recognize that there was no showing of an adverse effect on the child in reaction to any alleged misconduct or fault on the part of Appellant and no evidence of the probability of a reoccurrence of the conduct.

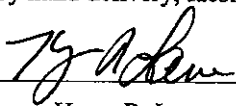
Appellant respectfully prays that the ruling of custody of the minor child of Appellant and Appellee, awarding the physical custody of the minor child to Appellee, rendered in the Chancery Court of Jefferson Davis County, Thirteenth Chancery District, the Hon. Joe Dale Walker, presiding, be overturned and, after an evaluation of the full record the Court will find that the chancellor's ruling is not supported by substantial evidence and that Appellant be awarded the physical custody of the minor child, with appropriate orders issued regarding support and visitation.

Respectfully Submitted,

Harry R. Lane, MS Bar No. [REDACTED]  
Counsel for Defendant/Appellant  
Mississippi Center for Legal Services Corp.  
111 E. Front Street, P.O. Drawer 1728  
Hattiesburg, Mississippi 39403-1728  
Telephone: 601-545-2950  
Facsimile: 601-545-2935

## CERTIFICATE OF SERVICE

I Hereby Certify that I have served a true and correct copy of the above and foregoing Appellant's Brief on the Hon. Joe Dale Walker, Chancellor, P.O. Box 909, Monticello, MS 39659-0909, and the Hon. April D. Taylor, Attorney at Law, P.O. Box 1526, Prentiss, Mississippi 39474, by placing a copy of the same, postage prepaid and properly addressed, in the first-class U.S. Mail, and/or by hand delivery, facsimile, or other electronic media, this 4<sup>th</sup> day of June, A.D., 2008.

  
\_\_\_\_\_  
Harry R. Lane