IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

CASE NO. 2008-CA-01114

PHYLLIS MINTER — APPELLANT

VS.

JOHN C. MINTER — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

Honorable Johnny L. Williams
Lamar County Chancery Court Judge

Honorable Len Melvin
Attorney for Appellant

Honorable T. Michael Reed
Attorney for Appellee

LEN MELVIN
Attorney for Appellant

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STATEMENT OF THE ISSUES

I. In *Riley v. Doerner*, the Mississippi Supreme Court announced a slightly alternate test to the traditional three-part test to modify child custody. The chancellor in this case relied on *Riley* in finding that custody of Clay could be modified. However, the chancellor misapplied the *Riley* standard as no facts or circumstances were present in this case to warrant a finding that the environment provided by Phyllis was adverse to Clay's best interest. As the *Riley* standard could not be met, the trial erred in finding that custody of Clay could be modified. Notwithstanding the trial court's misapplication of *Riley*, there were likewise no facts or circumstances present to justify a finding that a material change in circumstances in Phyllis's home had occurred that adversely affected Clay's welfare.

II. Only after a chancellor has made a clear finding that a material change in circumstances that adversely affects the best interest of the child can the chancellor perform an *Albright* analysis to determine what parent is best suited to have custody. In this case, the chancellor misapplied the *Riley* test and erroneously found that custody of the minor child could be modified. The chancellor then proceeded to re-weigh the *Albright* factors to determine if custody of Clay were better suited with John. Because John failed to meet the burden of showing a material change in circumstances adversely affecting Clay's welfare, the trial court was clearly erroneous in performing an *Albright* analysis.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition in Court Below

Phyllis Minter (hereinafter "Phyllis") and John C. Minter (hereinafter "John") were married on February 21, 1998. Transcript of Record at 9. One child was born unto the parties during their marriage, namely, John Clayborn Minter (hereinafter "Clay"), born July 13, 1999. *Id.* The parties divorced on August 22, 2000, on the ground of Irreconcilable Differences. R. at 23. Phyllis and John agreed to share joint custody with Phyllis having primary physical custody and John having standard visitation. R. at 27-29.

On May 10, 2005, John filed a Petition seeking modification of the custody of Clay. R. at 31. The trial court awarded temporary custody to John on December 9, 2005. R. at 49. Phyllis filed an Answer and Counter-Petition on February 4, 2007, seeking a modification of John's visitation and of his child support obligation. R. at 60-65. The case was heard by the trial court on June 20, 2007, and on October 30, 3007. On May 29, 2008, the trial court entered its Finding of Facts, Conclusions of Law and Final Judgment, wherein John was awarded with permanent physical care and custody of Clay. R. at 128-36. The trial court subsequently entered an Agreed Order of Clarification of the Final Judgment wherein Phyllis's visitation with Clay was more clearly articulated. R. at 138-39. Phyllis timely appealed the trial court's judgment modifying custody of Clay from her to John and now requests that custody of Clay be restored to her.

B. Statement of Facts

When the parties divorced, Phyllis lived in Hattiesburg and was gainfully employed. R. 128. Approximately one year later, Phyllis moved to Louisiana, to help care for her father who was suffering from lung cancer. T. at 8-9. During that time, Phyllis became pregnant and gave birth to her second child, Jacob, on December 11, 2002, out of wedlock. R. at 129. Jacob's father has been absent from his life since birth. *Id.* Although having Jacob out of wedlock, Phyllis testified that since the divorce, she has not had any live-in relationships or extended stays with any men not related by blood or marriage. *Id.* Clay and his younger brother, Jacob, have shared a very close relationship and remain close to this day. T. at 57.

Upon the divorce of the parties, Phyllis maintained primary physical custody of Clay for five and one-half years. During that time, Phyllis and John worked together so as to allow John liberal visitation with Clay. T. at 33. While attending private kindergarten in Phyllis's custody, Clay missed 35 days of school due to John picking Clay up on every other Thursday to exercise his weekend visitation as prescribed in the last custody order. T. at 37. Phyllis did not object to this as, according to her testimony, John would verbally and physically threaten her and tell her she had to obey him. T. at 38. Clay attended public elementary school in Phyllis's care until temporary custody was transferred to John on January 1, 2006. T. at 42.

Since the parties' divorce, both John and Phyllis have held several different jobs and have moved several different times. R. at 129. Phyllis is currently employed at a day care facility where she has worked for over two consecutive years. R. at 130. Additionally, Phyllis relies on food stamps for support. *Id.* John is self-employed as a painting contractor, which he claims to have been doing for the past three years. *Id.*

Sometime in 2001, Phyllis received a traffic ticket. T. at 44. Phyllis mistakenly thought the ticket had been taken care of, but since the ticket was not taken care of, Phyllis's license became suspended. *Id.* Phyllis did not become aware of this until mid-2007. T. at 46. Upon learning of the status of her license, Phyllis immediately cured the suspension. *Id.*

After John filed his petition to modify custody of Clay, the trial court issued a Temporary Order on August 15, 2005, appointing Dr. John Galloway (hereinafter "Dr. Galloway") to investigate the circumstances concerning the custody of Clay and to make a report and recommendation to the court regarding such custody. R. at 45. Additionally, the lower court ordered Phyllis and John to submit to drug testing and set the matter for trial on September 20, 2005. R. at 46. John submitted to drug testing on July 25, 2008, and the results were negative. R. at 47. Phyllis submitted to drug testing on November29, 2005, but due to an error on the part of the facility where the testing was performed, the lab would not release the results to the testing facility. Trial Exhibit No. 17.

The trial court issued another Temporary Order on December 9, 2005, wherein temporary custody of Clay was transferred to John, which would take effect on January 1, 2006. R. at 49. Phyllis was awarded visitation with Clay, and the case was again set for final hearing in June, 2006, with not specific date of trial specified. R. at 49-51. Additionally, the trial court ordered that the Department of Human Services perform a "home study" of both parties' residences and to make a report to the court and that the parties submit to family counseling no less than once per month during the period of January, 2006 to May, 2006. Id. On October 2, 2006, Phyllis's attorney filed a motion requesting that she be granted leave to withdraw as Phyllis's attorney. R. at 53. The trial court granted the motion on October 18, 2006, and the matter was continued so as to allow Phyllis time in which to obtain new counsel. R. at 56.

In February, 2007, Phyllis finally secured a new attorney to represent her in this case, and on February 14, 2007, Phyllis filed her Answer and Counter-Petition for Modification seeking to modify John's visitation and his child support obligation. R. at 60-64. The trial court entered an Agreed Order on March 8, 2007, wherein this case was again set for trial on June 20, 2007, and Phyllis was awarded additional visitation with Clay. R. at 70. This case went on for hearing before the trial court on June 20, 2007, but, as more time was needed for both parties to complete their cases, the matter was continued for a second day of trial to October 30, 2007. The trial did conclude on October 30, 2007, and the chancellor entered his Findings of Facts, Conclusions of Law and Final Judgment on May 29, 2008. R. at 128. John was awarded permanent physical care and custody of Clay subject to Phyllis's visitation. R. at 135.

The trial court relied heavily on Dr. Galloway's testimony in determining that custody of Clay could be modified. R. at 131. Dr. Galloway has a Ph.D. in sociology and describes himself as a counselor and a social worker. T. at 155-56. Dr. Galloway does not have a degree in psychology and is not a licensed professional counselor. T. at 156-59. After being appointed by the trial court to evaluate the parties, Dr. Galloway made a recommendation to the court on October 31, 2005. T. at 165. He stated John was doing a better of parenting Clay at that time than Phyllis. T. at 166. This conclusion was based on his finding that Clay was expressing an interest in his father and doing many of the things his father likes to do, John had a consistent pattern of going out of his way to take care of Clay, and Phyllis had experienced disruption in her life. Id. On the first date of trial, June 20, 2007, Dr. Galloway was called to make another recommendation to the Court concerning custody of Clay. However, he admitted that he was not aware that he was supposed to make a custody recommendation that day until the day before. T. at 171. Nonetheless, Dr. Galloway made his recommendation to the chancellor, stating that Clay

was doing well where he was and he saw no evidence or reasons to change anything. T. at 169. Although Dr. Galloway had been appointed by the trial court to evaluate the circumstances of the parties, he had been personally employed by Mr. Minter seven months prior to that appointment. T. at 173-74.

SUMMARY OF THE ARGUMENT

The trial court below erroneously modified child custody in this case. First, the chancellor misapplied the *Riley* test, an alternative test to the traditional requirements of child modification which allows a court to modify child custody when the environment provided by the custodial parent is adverse to a child's best interest and the noncustodial parent has changed positively and can provide a more suitable home. The trial court failed to articulate any findings of fact that could warrant a legal conclusion that the environment provided by Phyllis to Clay was adverse to his best interest under *Riley*. Although John's home environment had improved since the parties' divorce, that alone is not sufficient to warrant a change in custody.

Additionally, because the trial court applied the wrong legal standard in determining that custody *could* be modified, the chancellor was manifestly wrong to conduct an *Albright* analysis. A request for modification of child custody does not simply mean a re-weighing of the Albright factors to see which parent is now better suited to have custody of the child. However, the chancellor in this case essentially gave John another bite at the *Albright* apple. None of the facts or circumstances in this case gave the chancellor a sufficient justification under this Court's jurisprudence to conduct an *Albright* analysis. The trial court was, therefore, manifestly wrong to conduct such an analysis and erred even greater in taking custody away from Phyllis and awarding it to John.

ARGUMENT

To receive a modification of child custody, a petitioner must first prove a material change of circumstances that adversely affects the child. *Gray v. Gray*, 969 So.2d 906, 908 (Miss. 2007) (*citing Robison v. Lanford*, 841 So.2d 1119, 1124 (Miss. 2003)). If the petitioner is able to prove such a change of circumstances, the chancellor must then ask whether the best interests of the child warrant a change in custody. *Id.* The polestar consideration is the best interests of the child. *Id.* (*citing Brocato v. Brocato*, 731 So.2d 1138, 1141 (Miss. 1999).

Child custody matters are within the sound discretion of the chancellor. *Beasley v. Beasley*, 913 So. 2d 358, 360 (Miss. Ct. App. 2005) (*citing Sturgis v. Sturgis*, 792 So. 2d 1020, 1023 (Miss. Ct. App. 2001)). In a case disputing child custody, the chancellor's findings will not be disturbed unless the trial court was manifestly wrong, clearly erroneous, or the proper legal standard was not applied. *Mabus v. Mabus*, 847 So. 2d 815, 818 (Miss. 2003) (*citing Hensarling v. Hensarling*, 824 So. 2d 583, 587 (Miss. 2002)). The burden of proof is on the party requesting modification to show by a preponderance of the evidence that a material change in circumstances has occurred in the custodial home. *Id.*

I. THE TRIAL COURT ERRONEOUSLY APPLIED THE *RILEY* TEST TO DETERMINE IF CUSTODY OF CLAY COULD BE MODIFIED.

A request for modification does not simply mean a re-weighing of the *Albright* factors to determine which parent is now better suited to have custody of a child. *Beasley v. Beasley*, 913 So. 2d 358 (Miss. Ct. App. 2005) (*citing Sanford v. Arinder*, 800 So. 2d 1267, 1272 (Miss. Ct. App. 2001)). *See Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). Although an *Albright* analysis may be triggered in reviewing the facts and circumstances of a particular case, there must be a material change, not just a change in circumstances, that has had an adverse affect on the child which requires, or mandates, a change in custody for the best interests of the child. *Id.*

While many factors may be considered in the initial consideration of a custody award, only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change. *Holmes v. Holmes*, 958 So.2d 844, 847 (Miss. Ct. App. 2007) (*citing Lambert v. Lambert* 872 So.2d 679, 684 (Miss. Ct. App. 2003)). The Mississippi Supreme Court has clearly articulated the law of modification of child custody. The non-custodial parent must satisfy a three-part test: (1) a substantial change in circumstances of the custodial parent since the original custody decree, (2) the substantial change's adverse impact on the welfare of the child, and (3) the necessity of the custody modification for the best interest of the child. *Giannaris v. Giannaris*, 960 So.2d 462, 468 (Miss. 2007) (*citing Brawley v. Brawley*, 734 So.2d 237 (Miss. Ct. App. 1999)). A material change of circumstances of the party not having custody of the child is not in and of itself enough to warrant a change of custody. *Id.* (*citing Riley v. Riley*, 884 So.2d 791 (Miss. Ct. App. 2004)). The chancellor should consider the totality of the circumstances, meaning "the chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future. *Tucker v. Tucker*, 453 So.2d 1294, 1297 (Miss. 1984).

In *Riley v. Doerner*, the Mississippi Supreme Court applied a slightly different test in considering a modification of child custody. 677 So. 2d 740 (Miss. 1996). In *Riley*, the Court held that custody may be modified when the environment provided by the custodial parent is adverse to a child's best interests *and* the circumstances of the noncustodial parent have changed positively and can provide a more suitable home. *Id.* at 744 (*emphasis added*).

The chancellor in this case wrongly relied on *Riley* in finding that custody of Clay could be modified. R. at 131. The trial court found that since the divorce, Phyllis had relocated and had another child out of wedlock. *Id.* Also, Phyllis had at times relied on her family for support

and was currently receiving food stamps. *Id.* The court also mentioned that Phyllis had a suspended driver's license that was not cured until the first day of trial, June 20, 2007. *Id.* Additionally, the trial court relied on the testimony of Dr. Galloway. In his Conclusions of Law, the chancellor referred to portions of Dr. Galloway's testimony that he had found persuasive. *Id.* Specifically, Dr. Galloway stated that in his professional opinion, Phyllis was insufficiently self-reliant to provide proper parenting to Clay because he observed her blaming other people for the difficulties in her life. R. at 131-32. Additionally, Dr. Galloway opined that Phyllis had an inability to make plans for the future and overly relied on her family and environment for support and that because of the father-son bond between Clay and John and the difficulties that Phyllis was experiencing in her life, Clay would be better off in John's custody. *Id.* at 131-32. The basis for the trial court's reliance on Riley, however, is wholly insufficient to warrant a change in custody.

In *Riley*, the Court stated that it must first be shown that the custodial parent's environment is clearly adverse to the child's best interest. 677 So. 2d at 744. The Court in that case found such to be true in that the custodial parent admitted that she and her current husband occasionally used illegal drugs and that her husband's income, which she relied upon, was not regular and that it was hard to say what it was or would be. *Id.* at 742. Additionally, while in the custodial parent's home, the child had been moved a number of times, had attended several different schools due to the moves, and had even flunked the first grade. *Id.* The Court concluded that evidence that the home of the custodial parent is the site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that such environment has adversely affected the child's welfare. *Id.* at 744. The Court went on to state that once the chancellor had concluded that the custodial parent's

home was the site of illegal drug use, as well as other behavior adverse to the child's welfare, and determined that the noncustodial parent's circumstances had improved such that he was able to provide a good home for the child, it was within his discretion to transfer custody. *Id.*

The findings of fact articulated by the chancellor as a basis for modifying custody of Clay were insufficient to justify a modification under the legal standard set forth by this Court. To consider modification under *Riley*, the chancellor must first find the custodial home to be an environment adverse to the child's best interests so as to justify modification of custody without a substantial change in circumstances. No facts or circumstances were present in this case to warrant such a finding.

This Court reads *Riley* "narrowly as having some application in those situations where the existing custodial arrangement has shown itself to be actually detrimental to the child's well-being and the non-custodial parent can, by virtue of subsequent improvement in that parent's overall situation, demonstrate that he or she offers an alternative custodial arrangement beneficial to the child that did not exist at the time the original custody determination was made." *Beasley*, 913 So. 2d at 364 (*citing Hoggatt v. Hoggatt*, 796 So. 2d 273, 275 (Miss. Ct. App. 2001)). Additionally, *Riley* was intended to address only rare situations. *Id.*

The Riley test only applies when a child is living in generally adverse circumstances. In *Hoggatt v. Hoggatt*, this test was properly applied to modify custody to a father who showed that the mother had persistently failed to provide proper care for the child, including the disregard for the child's personal hygiene, lack of supervision that caused the child to repeatedly place himself in situations where he could easily have been subjected to substantial physical harm, and a blatant lack of concern over child's medical well-being. 796 So. 2d 273, 274 (Miss. Ct. App. 2001). Similarly, the *Riley* test was properly applied to modify custody based on substantial

evidence that the condition's of the custodial mother's home were below acceptable standards for basic cleanliness, that the children's physical needs were not being properly looked after, and that the mother's new husband had exposed the children to photographic material having a sexual content inappropriate for younger children. *Carter v. Carter*, 735 So. 2d 1109, 1113 (Miss. Ct. App. 1999).

Although not clearly articulated, the chancellor apparently found that Phyllis's environment was adverse to Clay's best interest due largely in part to her reliance on public assistance and her family for support. R. at 131. The chancellor specifically noted that Phyllis, who had been gainfully employed at a day care for over two years, was currently relying on welfare in the form of food stamps. R. at 130-31. Additionally, the chancellor relied on Dr. Galloway's opinion that because Phyllis overly relied on her family and environment for support and blamed others for the difficulties in her life, Clay would be better off in John's custody. R. at 131-32. However, it has been clearly rejected that a parent's receipt of aid for dependent children and social services from the Federal and State programs does not disqualify him or her from having custody and does not constitute a material change which adversely affects the child. *Robinson v. Robinson*, 481 So. 2d 855, 857 (Miss. 1986). If that were true, thousands of children would be taken from one or the other parent. *Id.*

The chancellor also cited the fact that Phyllis has not only relocated, but had another child out of wed-lock as support for his decision to modify custody. R. at 131. However, a custodial parent's move is not, in itself, a material change in circumstances. *Bell v. Bell*, 572 So. 2d 841, 846 (Miss. 1990). Moreover, the chancellor found that both Phyllis and John have had several different jobs and have each moved several times. R. at 129. The chancellor also stated that Phyllis testified that although she had a child out of wed-lock following her divorce from

John, the father of that child had been absent from birth, and she has not had any live-in relationships or extended stays with any men not related by blood or marriage. *Id.* Notwithstanding Phyllis's testimony, a custodial parent's cohabitation is not a reason for modification unless it adversely affects the child. *Forsythe v. Akers*, 768 So. 2d 943, 948 (Miss. Ct. App. 2000).

The chancellor made no finding whatsoever that would justify a material change in circumstances in the custodial home. The chancellor made no finding that the actual custodial arrangement was detrimental to the well-being of Clay. Therefore, the trial erroneously found that custody of Clay could be modified.

II. THE TRIAL COURT ERRONEOUSLY PERFORMED AN *ALBRIGHT* ANALYSIS AS NO MATERIAL CHANGE IN CIRCUMSTANCES ADVERSE TO CLAY'S BEST INTEREST WAS FOUND.

Only after a material change in circumstances as they relate to child custody has been found should the chancellor should use the *Albright* factors to decide which parent should have custody of the child. *Harper v. Harper*, 926 So. 2d 253, 256 (Miss. Ct. App. 2006). *See Albright*, 437 So. 2d at 1005. While many factors are considered in an initial custody determination, a request for modification does not simply give the petitioner another bite at the *Albright* apple. *Savell v. Morrison*, 929 So. 2d 414, 417 (Miss. Ct. App. 2006). If a material change in circumstances that adversely affects the child is found, it be must determined that the best interests of the child will be furthered by the purported change in custody before the change can be granted. *Id.* Courts must be consistent, diligent, and focused upon the requirement that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a child custody change." *Giannaris*, 960 So.2d at 467 (*quoting Morrow v. Morrow*, 591 So.2d 829, 833 (Miss. 1991)).

To modify custody, the non-custodial parent must first prove that a material change in circumstances has occurred since the issuance of the custody decree that has adversely affected the child's welfare. *Mabus*, 847 So. 2d at 818. Only then should the trial court consider the final factor – whether the child's best interests mandate a change of custody. *Id.* Because John failed to meet his burden of proving that a material change in circumstances had occurred that adversely affects Clay's best interest, the chancellor erred in conducting an *Albright* analysis.

III. WHETHER CUSTODY SHOULD BE MODIFIED IF A MATERIAL CHANGE OF CIRCUMSTANCES THAT ADVERSELY AFFECTS THE CHILD IS FOUND.

Based on the above finding that no material change of circumstances has occurred that is adverse to Clay to support a modification of custody, this issue is moot. However, so as to provide a comprehensive conclusion, this issue will be addressed.

In a child custody modification proceeding, if a material change in circumstances that adversely affects the child is found, it be must determined that the best interests of the child will be furthered by the purported change in custody before the change can be granted. *Savell*, 929 So.2d at 417. Post-divorce modification should only be entertained when it is shown that "parental behavior poses a clear danger to the child's mental or emotional health." *Id.* at 417-18. (*citing Beasley v. Beasley*, 913 So.2d 358, 361 (Miss. Ct. App. 2005)). If a material change in circumstances as they relate to child custody has been found, the chancellor should us the *Albright* factors to decide which parent should have custody of the child. *Harper v. Harper*, 926 So.2d 253, 256 (Miss. Ct. App. 2006). These factors are: 1) the health and sex of the child; 2) a determination of the parent that has 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 parents and the 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 the 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 other factors relevant to the parent-child relationship. *Id. See Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

1) The health and sex of the child.

Clay is a male child born July 13, 1999. He is currently eight years of age. This factor is neutral.

2) A determination of the parent that has had the continuity of care prior to the separation.

The parties were divorced in August, 2000, and Phyllis was awarded physical custody of Clay. Clay remained in her custody until January, 2006, when temporary custody was transferred to John. Phyllis has the continuity of care for a period of five and a half years. This case went on for trial beginning on June 20, 2007, which provided John with a continuity of care for a period of a year and a half, only pursuant to a temporary order. Thus, this factor heavily favors Phyllis.

3) Which parent has the best parenting skills and which has the willingness and capacity to provide primary child care.

Phyllis works at a day care in which Clay would come with her to work at 7:00 a.m., be taken and picked up from school by means of the day care, and taken back to the day care to remain with Phyllis until she gets off work. John is self-employed as a painting contractor. He testified that he is able to set his own hours, but his occupation requires him to go to job sites, manage workers, bid on jobs, oversee workers, etc. John's mother, who owns a day care,

testified that she is able to take care of Clay when John is working. Because Phyllis is willing and able to provide more primary child care, this factor favors Phyllis.

4) The employment of the parent and the responsibilities of that employment.

This factor weighs on the same facts and circumstances as stated in the third factor. In addition, Phyllis has maintained employment consistently since the parties' divorce. John testified that in 2002, he remained unemployed for a significant amount of time and received unemployment benefits from the Mississippi and Louisiana. As such, this factor favors Phyllis.

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

Phyllis is 38 years of age, and John is 40 years of age. Both testified that they are in good health. As such, this factor is neutral.

6) Emotional ties of parent and child.

Both parents are close to Clay and have developed emotion ties with him. This factor is neutral.

7) Moral fitness of the parents.

Phyllis is a day care worker and was described by her supervisor, Jaci Marix, as a "wonderful" employee. Ms. Marix went on to testify that Phyllis is one of the best employees and takes care of one of the toughest age groups at the day care facility. Phyllis testified that she does not drink, smoke, or do drugs. This testimony was not refuted. John testified that he smokes, drinks occasionally, had a prior DUI and two (2) convictions for public intoxication, but does not use drugs. Phyllis testified that John slapped her during a visitation exchange, which John denied. Phyllis also testified that John has called her names in front of Clay, such as "stupid bitch." Phyllis's sister, Gloria Deville, also testified that she has heard John call Phyllis a "stupid bitch". Phyllis had a child out of wedlock in 2002, but she denies that she ever lived or

had an extended stay with a man not related by blood or marriage. No evidence was presented to refute this testimony. No allegations were made that John cohabits or stays with women not related by blood or marriage. As such, this factor is neutral.

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

Clay has exhibited good grades with both parents. When Clay attended kindergarten the first time, he had a large number of absences, the source of which was disputed. Despite exhibiting good grades, he was held back and attended kindergarten over. During his second year of kindergarten with Phyllis, he only had a few absences and made good grades. He has completed first grade while living with John and has continued to make good grades. Learning skills are not achieved over night. So, this factor is neutral.

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

Clay is only eight years old and is not at the age sufficient to express a preference by law. As such, this factor is neutral.

10) Stability of home environment and employment of each parent.

Both parties have moved several times since their divorce. Consequently, both parties have held several jobs since that time as well. At the time of trial, however, both parties exhibited a stable home environment and employment. As such, this factor is neutral.

In weighing the *Albright* factors as described above, even if this court had found a material change in circumstances that adversely affects Clay, a modification of custody of would not be warranted as the majority of *Alright* factors favors Phyllis.

IV. WHETHER THE COURT SHOULD CONSIDER THE TESTIMONY PROVIDED BY DR. JOHN GALLAWAY WHO WAS OFFERED AS AN EXPERT AT TRIAL.

Dr. John Galloway was appointed by the court to make an investigation into the parties and the situation involving the minor child, Clay.

The admission of expert testimony is within the sound discretion of the trial judge. *Giannaris*, 960 So.2d at 469 *(citing Puckett v. State*, 737 So.2d 322, 342 (Miss. 1999). Rule 702 of the Mississippi Rules of Evidence provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Miss. R. Evid. 702.

This Rule "recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable." Comment to Miss. R. Evid. 702. The court must determine that the expert testimony is *relevant* – that is, the requirement that the testimony must assist the trier of fact. *Giannaris*, 960 So.2d at 469 (*quoting Mississippi Transp. Comm'n v. McLemore*, 863 So.2d 31, 38 (Miss. 2003)). (emphasis added). Next, the court must determine whether the proffered testimony is *reliable. Id. (citing Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002)) (emphasis added). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court provided a list of factors that trial courts may use in assessing the reliability of expert testimony. *Id. (citing Daubert*, 509 U.S. 579, 592-94 (1993)). These factors include 1) whether the theory or technique can be and has been tested; 2) whether it has been subjected to peer review and publication; 3) whether there is a high known or potential rate of error; 4) whether there are standards controlling the techniques of operation; and 5) whether the theory or technique enjoys general acceptance within a relevant scientific community. *Id.*

John tendered Dr. Galloway as an expert in the fields of social work, counseling, and sociology. After completing a voir-dire examination, Phyllis objected to Dr. Galloway testifying as an expert. The court overruled the objection. Dr. Galloway subsequently testified that in his

opinion Phyllis is an unfit mother and that custody of the child should be placed with John. He further opined that he was very close to recommending supervised visitation for her. The testimony presented at court along with Dr. Galloway's notes reflect that Dr. Galloway met numerous times with John and with the minor child in his presence but for only a thirty minute period with Phyllis at his office and without the minor child. This singular thirty minute visit was two (2) years prior to the trial. Dr. Galloway never went to Phyllis's home to view her living situation nor did he interview any of her friends, relatives, or employers. He further testified that his recommendation that John have custody was based partly on Phyllis at one point receiving food stamps. Dr. Galloway testified also that in reaching the opinion, he considered documents that were excluded by the Court at trial due to hearsay. Dr. Galloway received a considerable sum of money from John and billed him one hundred and fifty (150) dollars an hour while not billing Phyllis and receiving no compensation from her. Further, Dr. Galloway was appointed by the Court on August 15, 2005 to make a custody evaluation but failed to disclose to the Court that he had become employed by John in January of 2005 and had already been paid a considerable amount of money by John. Based on these material factors the court should find that Dr. Galloway's testimony is not reliable nor relevant or credible and herein reject Dr. Galloway's recommendation as to custody.

CONCLUSION

To modify child custody, a chancellor may conduct one of two tests. The first, or "traditional," has been clearly established and articulated by many years of jurisprudence. The non-custodial parent must prove (1) a material change in circumstances has transpired since the issuance of the custody decree; (2) that adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody. The second, or "alternate," test was

established in *Riley v. Doerner* and only applies in rare, limited circumstances. The *Riley* test requires the noncustodial parent to prove that (1) the environment provided by the custodial parent is adverse to the child's best interests and (2) that the noncustodial parent's circumstances have changed such that he or she is able to provide an environment more suitable than that of the custodial parent.

The chancellor in this case misapplied the Riley test. There was no evidence whatsoever to warrant a finding that Phyllis's environment was adverse to Clay's best interest. Additionally, notwithstanding the misapplication of the *Riley* test, no facts or circumstances warrant a finding that a material change in circumstances adverse to Clay's welfare has occurred since the parties' divorce. The findings stated by the chancellor in concluding that custody could be modified are wholly insufficient as well. John's claim for custody fails both tests for modification. Despite the fact that the chancellor wrongly applied *Riley*, there is simply nothing in this case to warrant a modification of custody. Therefore, Phyllis respectfully requests that this Court reverse the trial court's judgment and render that custody of Clay be restored to Phyllis.

Respectfully submitted, this the 7th day of November, 2008.

PHYLLIS MINTER, Appellant

BY: _____

LEN MELVIN, [redacted]
Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

No. 2008-TS-01114

PHYLLIS MINTER **APPELLANT**

VS.

JOHN C. MINTER **APPELLEE**

CERTIFICATE OF SERVICE AS TO FILING

I, Len Melvin, attorney for Appellant, do hereby certify that I have this day hand-delivered for filing the original and three (3) copies of the foregoing Brief of the Appellant to the Supreme Court Clerk, Ms. Betty Sephton, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201-1082.

THIS the 7th day of November, 2008.

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CERTIFICATE OF SERVICE

I, Len Melvin, attorney for Appellant, do hereby certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following:

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THIS the 7th day of November, 2008.

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