IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ERICA ROSE WHEAT	**APPELLANT**
VERSUS	**CASE NO.2009-CA-00074**
THANASIS G. KOUTSOVALAS	**APPELLEE**

APPEAL FROM

THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

STEPHANIE L. MALLETTE
205 JEFFERSON ST., STE A
P.O. BOX 80170
STARKVILLE, MS 39759-0170
Telephone: 662-320-4411
Facsimile: 662-320-4420
MSB 99200
Attorney for Erica Rose Wheat

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ERICA ROSE WHEAT	**APPELLANT**
VERSUS	**CASE NO.2009-CA-00074**
THANASIS G. KOUTSOVALAS	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

Thanasis G. Koutsovalas, Appellee

Timothy Hudson, Attorney for Appellee

Erica Rose Wheat, Appellant

Stephanie L. Mallette, Attorney for Appellant

Honorable H.J. Davidson, Jr., Chancellor

STEPHANIE L. MALLETTE
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. WHETHER THE CHANCELLOR ERRED AND ABUSED HIS DISCRETION IN HIS APPLICATION OF THE *ALBRIGHT*[1] FACTORS IN AWARDING CUSTODY TO THE FATHER?

II. WHETHER THE CHANCELLOR'S FINAL ORDER GRANTING CUSTODY TO THE FATHER IS IN ERROR DUE TO ITS AMBIGUITY?

[1] Albright v. Albright, 437 So.2d 1033 (Miss. 1983).

STATEMENT OF THE CASE

On May 6, 2008, Thanasis G. Koutsovalas, by and through his attorney of record, Tim Hudson, filed a Petition to Establish Paternity and Custody in the Chancery Court of Lowndes County Mississippi. That same date, the Honorable H. Jim Davidson, Jr., was assigned by the Honorable Lisa Younger Neese, Lowndes County Chancery Clerk, as the Chancellor in this matter. On May 7, 2008, a Fiat was filed which set the matter for a temporary hearing on May 21, 2008, at 9:30 a.m. at the Clay County Courthouse. On May 7, 2008, a summons was issued for Erica Rose Wheat. It was personally served on Erica Wheat on May 9, 2008.

Another Fiat was issued and filed on May 16, 2008, setting this matter for trial on the merits on July 23, 2008, at 9:00 a.m at the Lowndes County courthouse. Furthermore, it ordered that the Defendant/Appellant should respond in writing within seven (7) days of service of process stating the factual and legal reasons why the relief requested should not be granted.[2] This Fiat setting the matter for trial was signed by Chancellor Davidson as well as filed on May 16, 2008. On May 21, 2008, counsel for the Appellant entered an appearance and certified service on opposing counsel pursuant to the Mississippi Rules of Civil Procedure. That same date, another summons was filed which was issued on May 16, 2008. Though difficult to make out, common sense indicates that the Defendant/Appellant was served on May 20, 2008, by personal service.

---

[2] It is uncertain what the Chancellor and counsel for the Plaintiff/Appellee based this seven-day requirement upon. A thorough review of Rules 4 and 81 indicate that paternity matters may be tried thirty days after personal service, and custody matters may be tried seven days after personal service. This conflict is one of many reasons the Court has strongly suggested to Chancellors that custody and paternity issues be resolved in separately brought proceedings. Regardless, Rule 81(d)(4) clearly states that a responsive pleading is not required in custody matters unless specifically ordered by the Chancellor. The Appellant unfortunately can provide no guidance to the Court as to why the Fiat setting the matter for trial and signed by Chancellor Davidson required a responsive pleading.

On July 14, 2008, counsel for the Plaintiff/Appellee filed a Notice of Service wherein he stated that he had forwarded to counsel for the Appellant a copy of the Appellee's Rule 8.05 Financial Statement. On July 16, 2008, the Appellant filed an Answer with the Chancery Clerk of Lowndes County, Mississippi. On July 23, 2008, a Temporary Agreed Order was signed by Chancellor Davidson as well as counsel for the Mother (Appellant) and counsel for the Father (Appellee). In that Temporary Agreed Order, the parties agreed that the Mother would have primary physical custody of the minor child of the parties with the Father having visitation from 6:00 p.m. on Friday, July 25, 2008, until 6:00 p.m. on Sunday, July 27, 2008, and ever other weekend thereafter until the case was resolved. Further, this order set the matter for trial on October 17, 2008, at 9:30 a.m. at the Lowndes County courthouse.

Trial was held before Chancellor Davidson on October 17, 2008, and the Court entered its Opinion of the Court on November 21, 2008. (R.E. 4) In that Opinion, the Court gave "custody" to the Father and standard visitation to the Mother comprising every other weekend from Friday to Sunday, two weeks during the summer, and alternating holidays. The Court made no distinction between physical and legal custody in its Opinion. On December 18, 2008, Chancellor Davidson entered a final Order repeating his determination from his Opinion of the Court. (R.E. 3) As was the case in the Opinion of the Court, Chancellor Davidson granted "custody" to the Father, and gave reasonable rights of visitation to the Mother with no distinction being made between legal and physical custody.

On December 19, 2008, the Appellant Mother filed a Motion to Reconsider. The Chancellor denied granting that Motion on December 22, 2008. Aggrieved by the Chancellor's determination, the Mother files this appeal requesting that the Court overturn the custody determination.

SUMMARY OF THE ARGUMENT

I. The Chancellor abused his discretion in awarding custody to the father because of his failure to fully apply and also misapplication of the *Albright* factors. The Chancellor did not consider the age of the child in question sufficiently and misapplied and failed to consider certain relevant evidence as it pertained to his application of the *Albright*.

II. The Chancellor committed reversible error when, in his final opinion and order, he failed to account for and/or explain his decision concerning legal custody of the minor child in question.

I. Factual Background

The Appellant agrees, except as discussed in detail in the principal brief, the findings of fact of the Chancellor in his opinion, found in the record excerpts, (R.E. 4) except for all issues concerning health insurance of the minor child.

II. Argument

Standard of Review

The standard of review in domestic relations cases is the so-called "substantial evidence/ manifest error" rule. Brocato v. Brocato, 731 So.2d 1138, 1140 (Miss. 1999); Law v. Page, 618 So.2d 36, 101 (Miss. 1993); Polk v. Polk, 589 So.2d 123, 129 (Miss. 1991); Philips v. Phillips, 555 So.2d 698, 701 (Miss. 1989). This Court may only disturb the determination and final order of Chancellor Davidson if it determines that his decision to award "custody" to the Father if Chancellor Davidson committed manifest error in reaching his decision.[3] *Id.* This Court has stated repeatedly that, "Above all, in 'modification cases, as in original awards of custody,' we never depart from our polestar consideration the best interest and welfare of the child.'" Riley v. Doerner, 677 So.2d 740, 744 (Miss. 1996) (quoting Ash v. Ash, 622 So.2d 1264, 1266 (Miss. 1993))(citing Marascalco v. Marascalco, 445 So.2d 1380, 1382 (Miss. 1984)). *See also* Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983). Further, as this Court has written numerous times, unless there is an abuse of discretion, the Court will not disturb the factual findings of the Chancellor. In order to do so, the Court must find that the factual determinations of the Chancellor are manifestly wrong, clearly erroneous, or the Chancellor abused his discretion. Jerome v. Stroud 689 So.2d 755, 757 (Miss. 1997). However, as is often overlooked, in Stroud, the Court found that where the Chancellor improperly considers and applies the Albright factors,

[3] The Appellant is referring to the Chancellor's custody determination with quotation marks based on her second assignment of error regarding the ambiguity of the Order as to legal v. physical custody.

an appellate court must find the Chancellor committed error. Stroud, 689 So.2d at 757 (citing Smith v. Smith, 614 So.2d 394, 397 (Miss. 1993)).

Discussion of the Law

I. WHETHER THE CHANCELLOR ERRED AND ABUSED HIS DISCRETION IN HIS APPLICATION OF THE *ALBRIGHT* FACTORS IN AWARDING CUSTODY TO THE FATHER.

The Appellant contends that Chancellor Davidson errs in his application of the Albright factors. Reviewing those factors in light of the record and Chancellor Davidson's Opinion of the Court:

1. Age, Sex, and Health of the Child:

The trial court found that this factor favors the Father in a four line explanation. Correctly, the Chancellor identified the minor child of the parties as being three years of age. However, the Chancellor failed to address the age of the child. In 2001, the Mississippi Supreme Court reversed and remanded the decision of the Chancellor regarding this Albright factor in Hollon v. Hollon. Hollon v. Hollon, 784 So.2d 943 (Miss. 2001). In that case, Justice Diaz wrote,

> "Although this Court has weakened the 'tender years' doctrine recent years, there is still a presumption that a mother is better suited to raise a young child. Sobieske v. Preslar, 755 So.2d 410, 413 (Miss. 2000). Chancellor Watts began his analysis of the case with the statement that the child was barely three years old at the time the trial ended. He pointed out that the tender years doctrine had been weakened and found Zach to be a healthy male child, with no physical or mental impairments who could be cared for equally well by both parties. The chancellor did not explicitly say that this factor favored one party over another. This factor favors Beth because the legal presumption, although weakened, still favors the mother to raise a very small child."

Hollon at 947. Justice Diaz wrote in footnote two,

> "The prominence of the 'tender years' doctrine has been tempered, but not abrogated by this Court. In Buntyn v. Smallwood, 412 So.2d 236, 238 (Miss. 1982) this Court noted that if the mother of a child of tender years is fit, then she should have custody. However, this Court modified that view in Albright v. Albright, 437 So.2d 1003 (Miss. 1983) when the 'tender years' doctrine was characterized as a factor worthy of weight in determining the best interest of a child. *See also* Pellegrin v. Pellegrin, 478 So.2d 306, 307 Miss. 1985."

Hollon at 947.

Nowhere in Chancellor Davidson's Opinion nor final Order does he articulate that he considered the tender years of the minor child of the parties. He found that this factor favored the father when that determination clearly runs afoul of this Court's decision in Hollon. *Id.* Chancellor Davidson based his finding on the fact that the Mother had allowed the child's Medicaid coverage to lapse. Her sworn, uncontroverted testimony was that she had completed the paperwork to have the child's benefits reinstated. (T. 104-105). She stated that she did not receive the paperwork because she had moved several times which is quite logical and understandable. (T. 105). It is unreasonable to expect a twenty year-old single mother to know the intricacies of the Medicaid program.

Further, the Chancellor found that the Father was capable and willing to provide medical coverage for the minor child of the parties. However, the Chancellor failed to consider that there was no testimony why the Father had failed to do so. It would appear that the Father wants to sit on his laurels and point out the inadequacies of the Mother without noticing the plank in his own eye. If he was so overly concerned about the lack of coverage for the child, logic dictates that he would have immediately enrolled the child on his medical insurance.

Chancellor Davidson apparently did not recall the Father's testimony from the trial:

BY MS. MALLETTE: But in recent past, six months, which is a pretty long time when you consider your son is only three, there haven't been any of these problems that alarmed you originally, have there?

BY MR. KOUTSOVALAS: Well, there has been a major problem is currently the baby is not insured. What happens if he gets sick today or tomorrow?

BY MS. MALLETTE: Okay. All right.

BY MR. KOUTSOVALAS: I can provide medical coverage for the child.

BY MS. MALLETTE: Have you?

BY MR. KOUTSOVALAS: Not yet, I haven't, but I can.

BY MS. MALLETTE: So you're just as much at fault for that as Erica?

BY MR. KOUTSOVALAS: I am not at fault for that, because I was leaving it to her. It was her responsibility. Like everything else, she didn't follow up through it.

BY MS. MALLETTE: Okay. It's not your responsibility to provide health care for your child, it's her responsibility?

BY MR. KOUTSOVALAS: It is my responsibility, but I was letting her do it that way.

T. (75-76).

Clearly, the Chancellor's failure to consider the tender years doctrine is reversible error as well as his preference to the Father over the Mother on this issue when her failure to maintain Medicaid coverage was weighed against her when the Father's failure to obtain coverage for the child was counted as being to his advantage. By his own admission, it was his responsibility as well. (T. 76)

2. Continuity of Care Prior to the Separation:

The Chancellor found that this factor slightly favored the Mother. Therefore, argument pertaining to this factor would be self-defeating.

3. Parenting Skills:

The Chancellor gave no preference to either parent under this factor properly as the evidence was clear that the Father and the Mother were quite willing to have custody as well as having appropriate skills.

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

The Chancellor erroneously found that this factor favored neither party when he should have found from the evidence presented that this factor favored the Mother. The distinguishing fact here is who is caring for the child when each parent is working. As Chancellor Davidson correctly noted, the parents work roughly the same schedules. However, with the Father having full custody, the child comes home from daycare and is in the care of the Father's wife (the child's stepmother). Chancellor Davidson ultimately gave preference to having this three year-old child spend evenings with his stepmother rather than his natural maternal grandmother, natural maternal grandfather, and half brothers. Giving no favor to a natural, blood relationship over a stepmother whose involvement and character are still a mystery is honestly perplexing.

The transcript of the trial is replete with examples of reasons Chancellor Davidson should have given favor to the Mother on this factor:

BY MR. HUDSON: And what kind of relationship does your wife have with the child?

BY MR. KOUTSOVALAS: Fairly good one.

(T. 70-71)

BY MS. MALLETTE: Okay, you moved out why?

BY MS. WHEAT: Because he informed--because I found out that he was cheating on me actually.

BY MS. MALLETTE: With?

BY MS. WHEAT: With his new wife.

BY MS. MALLETTE: Okay. They met at--where did they meet? Do you know?

BY MS. WHEAT: I suppose they met at Columbus Air Force Base.

BY MS. MALLETTE: They work together?

BY MS. WHEAT: Yeah.

(T. 93-94)

BY MRS. KOUTSOVALAS: No. Unfortunately, Erica was lazy, and I -- she did nothing. I did it. . .No, I never tried to control Erica or I never tried to take her place. She is his mom. Tom's wife is not his mom. Erica Wheat is T -- Thomas John Koutsovalas' mother, but Erica Wheat needs to be his mother, and she's not.

(T. 36-37).

By the uncontroverted testimony of Erica Wheat, it seems clear that Mr. Koutsovalas considers his work responsibilities to include cheating on the mother of his child with a co-worker and then subsequently marrying the same woman. (T. 93-94). To not count this factor against him was indeed manifest error. Giving preference to a non blood-relative over the full blood-related maternal side of the child's family due to the work schedules of the parents was an error on the part of the Chancellor.

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

The Chancellor found that both parents are of an age and able to adequately care for the minor child and both are physically and emotionally fit. The Court placed emphasis, in weighing this factor in the Father's favor, that Ms. Wheat had been convicted of disorderly conduct at the Father's home. Further, the Court pointed out that the child was not present during the

---

[5] Mrs. Koutsovalas is the paternal grandmother of the child in this matter. The Father's wife did not testify.

altercation. Apparently, the Chancellor failed to consider that the Mother was nineteen years old when she was impregnated by the Father; and by her uncontroverted testimony, she put all she had and then some into the purchase of the trailer the Father now claims as his home. (T. 84-87) Further, the Chancellor should have considered that this twenty year-old now single mother discovered that the Father was cheating on her with his now wife. In addition, the Father was lying to the Mother about the relationship. (T. 94)

There is scant evidence in the record regarding the circumstances of this conviction for disorderly conduct. None of the facts were clearly developed regarding precisely what happened. The Mother admitted, as she should have, that she was convicted. (T. 13). But beyond that, there is no way the Chancellor knew enough about the conviction to weigh this custodial decision factor against the Mother. Given the nature of the situation, it is quite understandable that passions ran high at many points in this relationship, and things likely got out of hand. However, there was insufficient testimony or evidence in front of the Chancellor to justify weighing this factor against the Mother.

Kelly Martin, a friend of Erica Wheat's, correctly noted:

BY MS. MALLETTE: So you've been sort of an observer and been her friend through the last three years of her life with TJ?

BY MS. MARTIN: Yeah

BY MS. MALLETTE: Have there been a lot of ups and downs?

BY MS. MARTIN: Oh, yeah.

(T. 122-123)

BY MS. MALLETTE: And you know Tommy?

BY MS. MARTIN: Uh-huh.

BY MS. MALLETTE: And do you have a friendship with him or relationship with him?

BY MS. MARTIN: We--me and his brother go way back from middle school, and that's --I don't know too much about him, but --

(T. 124)

BY MS. MALLETTE: All right. There have been -- have there been some problems between Erica and Tommy that you have observed and you know about personally?

BY MS. MARTIN: Personally, I think it's using the child as a tool to get back at each other or somethin and --

BY MS. MALLETTE: That would be immature behavior?

BY MS. MARTIN: Yeah.

BY MS. MALLETTE: On both their parts?

BY MS. MARTIN: She has had her spats.

BY MS. MALLETTE: He has, and she has as well?

BY MS. MARTIN: Uh-huh.

(T. 124-125)

Apparently, the Chancellor disregarded Ms. Martin's testimony that they had both behaved immaturely and gave an advantage to the Father which was error. Reading the testimony of Erica Wheat and Thanasis Koutsovalas, it seems clear that he is quite immature given his responses to simple questions.

The best evidence regarding the maturity of the mother came from her own words in mature and honest self-reflection:

BY MS. MALLETTE: Okay. No doubt Tommy is a good father, he is doing a lot of things that a lot of young men his age don't do?

BY MS. WHEAT: He's a very good father.

BY MS. MALLETTE: He has stepped up to the plate and is trying to take care of his son?

BY MS. WHEAT: He is. He is a good father.

BY MS. MALLETTE: And do you have any doubt he has your son's or has y'all's son's, y'all's child's best interest at heart?

BY MS. WHEAT: No. Huh-uh.

BY MS. MALLETTE: Where do you believe that TJ is best served to be right now?

BY MS. WHEAT: I think that TJ is where he needs to be. He needs to be with his mother. He needs to be with his father also. I don't believe that he should be taken from either one of us or one person should have more control over the father. We're both his parents, and we should both be there equally for him.

BY MS. MALLETTE: Okay.

BY MS. WHEAT: I don't believe he would be better off with Tom or better off with me, because we both love him, and we both take good care of him. No matter what I did in my past, where I messed up, that's not my life anymore. I take good care of my son, and I know he takes good care of him, and I think he should be split between the two of us.

(T. 99)

In stark contrast, the Father had a somewhat less circumspect appraisal of the situation:

BY MS. MALLETTE: Now, you and Erica generally get along fairly well?

BY MR. KOUTSOVALAS: All right, I guess.

BY MS. MALLETTE: Recent history, the last six months, y'all have gotten along fairly well?

BY MR. KOUTSOVALAS: Yes.

BY MS. MALLETTE: Worked together for a common goal, and that being TJ's best interest --

BY MR. KOUTSOVALAS: Yes.

BY MS. MALLETTE: --what's best for TJ? Okay. Now, I don't want to put words in your mouth, and I'm not asking you to draw a conclusion. I just want to kind of see if I can summarize what you are saying. Are you saying to the Court that Erica--do you believe that Erica is a fit and suitable person to have custody independent of you? If you weren't in the picture, just from the outside looking in, would you have a problem with her having custody of your son?

BY MR. KOUTSOVALAS: No.

BY MS. MALLETTE: Okay. you just think you are a better choice?

BY MR. KOUTSOVALAS: Well, you twisted that question. Yes, I would have a problem with her having custody.

BY MS. MALLETTE: You don't think she should have any custody at all?

BY MR. KOUTSOVALAS: Not full custody, no I don't.

BY MS. MALLETTE: Should she have--

BY MR. KOUTSOVALAS: Not with her habits.

BY MS. MALLETTE: Would she have any involvement in making decisions for the child?

BY MR. KOUTSOVALAS: No major decisions, no.

BY MS. MALLETTE: Okay. So you want to have complete and total control and custody?

BY MR. KOUTSOVALAS: Yes.

BY MS. MALLETTE: Okay. Based on what?

BY MR. KOUTSOVALAS: Based on--what do you mean based on what?

BY MS. MALLETTE: What do you base that opinion on?

BY MR. KOUTSOVALAS: A person that would rather get high, go out partying, and do whatever else she does, does not need to be making decisions on a three year-old little boy to involve his health or anything to do with him.

(T. 81-83)

Apparently, from his high and mighty perch, the Father is not able to see the obvious. Ms. Wheat repeatedly takes responsibility for an approximate six month time period in her life where she was not doing what she needed to do to take care of herself much less anyone else--including her son. She was quite forthcoming throughout her testimony about her mistakes and what she is doing to move forward and not keep looking behind. However, Mr. Koutsovalas seems to think the fact he had unprotected sexual relations with and impregnated a nineteen year-old girl to whom he was not married when he was twenty-four years old only to then cheat on her with a co-worker while the Mother was at home nursing places him in the perfect position to make this judgment call. In placing this factor in the father's column, the Chancellor had to base his determination on matters outside the record. The record of the sworn testimony clearly indicates that this is a situation where two young adults had a child when neither of them was ready for the responsibilities of parenthood. And the Mother is the only person who seems to be willing to admit to any mistakes.

6. Emotional Ties of Parent and Child:

The Chancellor gave no favor to either parent on this factor. However, the Appellant would like to incorporate by reference her argument on the first factor as to the "tender years" presumption.

7. Moral Fitness of Parents:

In his opinion, the Chancellor lays out what Ms. Wheat had done that tended to indicate she does not have good moral fitness. However, even Chancellor Davidson added that the Mother is no longer seeing the young man who led her down the wrong path. Further, the Court found, "Her drug use and bad check writing occurred three months prior to the trial. Mother

asserts that she has changed her life around. She is living with her parents and is no longer associating with Karriem Hamilton." (R.E. 4, Pg. 9) Trial was had on this matter on October 17, 2008. According to the Chancellor's determination, Erica Wheat was with Karriem Hamilton and using drugs after the Temporary Order (July 23, 2008), but before the trial. One could deduce that to be the case from Ms. Wheat's testimony. The Mother testified:

BY MS. WHEAT: I was unemployed between Papa John's and this Domino's job maybe two months, and I left Papa John's because--not to be an irresponsible parent and just quit my job, but Kareem Hamilton was working there, and that was one thing, I had to get away from him, had to get him out of my life, and that's why I left Papa John's.

(T. 103).

Based on the Chancellor's ruling, he was only interested in penalizing Ms. Wheat for her indiscretions while he seemed to completely overlook Mr. Koutsovalas'. The foundation of this case, the minor child of these parties, was created based on an indiscretion by both Ms. Wheat and Mr. Koutsovalas. It seems clear that neither of them wanted a baby with the other. They both characterized their relationship as casual, and the record seems to indicate that the only reason they had a relationship after the birth of their son was to try to be good parents for him. The fact that Mr. Koutsovalas is now married to one of his co-workers with whom he was having a relationship while the mother of his child was at home tending to the house was not even considered by the Chancellor. If it was, it is not in his findings. And as this Court has pointed out repeatedly, if it is not in the record, it did not happen.

Ms. Wheat was honest with the Court that she had bad checks with the District Attorney's bad check unit. (T. 107-108). Ms. Wheat had no criminal charges pending regarding these checks. (T. 108). The only things the Chancellor considered were a disorderly conduct conviction regarding the Father from 2007, a relationship with Kareem Hamilton (a co-worker

much like the Father's current wife), two months of drug use, and some bad checks. If he considered the bad behavior of the Father, Chancellor Davidson failed to articulate that fact.

The Supreme Court has stated without equivocation:

> "The chancellor used the decision as a way to punish Lackey for her indiscretions. This Court has long opined that this is not acceptable. In Phillips, this Court stated that 'a change in custody should never be made for the purpose of rewarding one parent or punishing another.'" Phillips, 555 So.2d at 701 (quoting Tucker v. Tucker, 453 So.2d 1294, 1297 (Miss. 1984) (citations omitted)). In Rushing, this Court stated that '[t]he polestar consideration in custody matters is the best interest of the child, not marital fault.' Rushing, 724 So.2d at 916 (citing Moak v. Moak, 631 So.2d 196, 198 (Miss. 1994)."

Lackey v. Fuller, 755 So.2d 1083, 1087 (Miss. 2000). Admittedly, the facts in Lackey are different because that case involved a modification as opposed to an initial custody determination. Lackey at 1084. However, Justice Pittman seems very adamant that the focus should be on the best interest of the child and not because parents have made bad decisions. *Id.* Clearly, Chancellor Davidson's failure to even acknowledge any bad behavior on the part of the Father or that he attempted to find evidence of poor moral fitness showed that his focus was on the bad decisions of the Mother. (R.E. 3) Nothing is mentioned in the final judgment of the Court about the Father having good moral fitness and character--just that the Mother has poor moral fitness. It seems counter-intuitive that an Albright factor as important as this one is can be put in the Father's column by default. The Chancellor did not make a finding that the Father was a fit and suitable parent. He made a finding that the Mother was not. Most notably, the Father is not even mentioned in this factor yet the Chancellor awards it to him. (R.E. 4). And the Chancellor substituted his opinion for that of the Father.

BY MS. MALLETTE: But you've actually--Erica has let you have him every weekend?

BY MR. KOUTSOVALAS: Because we came to an agreement, yes.

BY MS. MALLETTE: Right. The two of you came to an agreement--

BY MR. KOUTSOVALAS: Yes.

BY MS. MALLETTE: --wherein y'all would do exactly what you're doing? And that has been going on for the last six months?

BY MR. KOUTSOVALAS: Been going fine for about the last six months.

BY MS. MALLETTE: All right. Have there been any problems in the last six months? I mean, other than minor scrimmages [sic], I mean, any serious problems between you and Erica with this arrangement?

BY MR. KOUTSOVALAS: No.

BY MS. MALLETTE: Why does this arrangement need to change then?

BY MR. KOUTSOVALAS: Because I'm not comfortable with the kind of relationship we're--arrangement she has got. My child deserves to have his own room and a steady environment, not being passed around from day to day.

(T. 74-75)

Once again, the Father wanted to have his cake and eat it, too. In one breath, he was quite willing to admit that Erica compromised and worked with him to give the Father visitation above and beyond what the Temporary Agreed Order allowed. However, he seemed quite adamant that the child did not need to be passed around from day to day; yet, he stated that doing that had been working fine. His concern here was not that the Mother is not morally fit or unsuitable to be the custodial parent. He was concerned that the child does not have his own bedroom despite Ms. Wheat's repeated assertions that this is a temporary arrangement.

Further, the Mother describes a much different home environment than what the Father does:

BY MS. WHEAT: Obviously, I fell off, and I did a lot of things I'm not proud of, but I'm here today. I'm on my feet. I'm doing better. I have a job. I'm working to get myself my own home so my child can have his own bedroom and his own things that seem to be so important.

BY MS. MALLETTE: And they are important?

BY MS. WHEAT: Yes, they are.

BY MS. MALLETTE: You want those things for TJ?

BY MS. WHEAT: Yes, they are, but everybody goes through a hard time in their life.

BY MS. MALLETTE: Is TJ in any danger at all at your parents' house?

BY MS. WHEAT: No, he is very loved at my parents' house, and he is taken very good care of.

BY MS. MALLETTE: Does he get a lot of attention from your two brothers?

BY MS. WHEAT: Of course he does.

BY MS. MALLETTE: And how old are they?

BY MS. WHEAT: 5 and 16.

BY MS. MALLETTE: Okay. And so y'all have a big happy family?

BY MS. WHEAT: Very much so.

BY MS. MALLETTE: And your mom and dad live there in the home together?

BY MS. WHEAT: Yes.

BY MS. MALLETTE: They've been together--married for how long?

BY MS. WHEAT: 26, 27 years.

BY MS. MALLETTE: So a very stable home environment?

BY MS. WHEAT: Very stable.

BY MS. MALLETTE: Crowded?

BY MS. WHEAT: No so much so, maybe only a three bedroom house, but it's a large house.

BY MS. MALLETTE: Okay. So it's --

BY MS. WHEAT: We're not crosed.

BY MS. MALLETTE: So it's not impressively [sic] crowded?

BY MS. WHEAT: Not at all.

BY MS. MALLETTE: And you'd like for TJ to have his own bedroom?

BY MS. WHEAT: Of course, and he will one day.

BY MS. MALLETTE: And you're working very hard to make that happen for him?

BY MS. WHEAT: Yes, I am.

(T. 96-97).

The uncontroverted testimony of the only person living in the Wheat family home was that it was not an ideal situation with TJ not having his own room, but he was surrounded by positive role models on a healthy marriage, two brothers, and his Mother. It seems quite odd that the Chancellor considered this to be a less suitable environment than a house trailer by the Air Force base where the only other person there besides his Father is the child's stepmother whose relationship with the child is unknown. Further, the paternal grandparent's home is not exactly a great place for TJ to be staying. The paternal grandmother by her own admission has Chronic Obstructive Pulmonary Disease and is still smoking. (T. 54). She also has mental problems and is taking psychotropic medication. (T. 50). Thomas's brother, Nicholas, had just been released from the penitentiary and was on parole for either selling cocaine or possessing a sufficient amount to warrant a sentence of incarceration. (T. 86) Making that home even less desirable is the fact that Thomas's brother worked as a confidential informant for law enforcement and is thus placing himself and everyone around him in peril of being the victims of a retaliatory crime. (T. 87). While all the witnesses seem quick to point out that Nicholas is not a bad guy, he just

made some mistakes, they were not willing to extend the same kindness to Erica. The Chancellor held the fact Erica used drugs for two months and should only get to see her son four days a month and have no custodial rights while Nicholas is apparently just misunderstood. (T. 38-45).

This factor clearly is neutral or should have gone to the benefit of the Mother.

8. Home, School, and Community Record of the Child:

The Court's articulation of its ruling on this factor is devoid of reasoning why this factor favors the Father. If anything, the factor favors the Mother because she was responsible for getting the child to daycare every day of the week except for Monday. (T. 97-98). At worst, it was a neutral factor because the Father did pay for the daycare costs.

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

The Chancellor properly ruled that the child is not of an age to express a preference by law and that the factor favored neither party.

10. Stability of the Home Environment:

The Court found that this factor favors the Father. However, it is unclear how a house trailer with just the Father and the stepmother living there is a more suitable living environment than a house with blood relatives who are there to nurture, encourage, and meet the needs of the minor child. The Court failed to articulate what bearing the child not having a room has on anything. Great weight was given to that single fact without any explanation as to why the Chancellor believed that it is so significant. The Court failed to express why it is unacceptable for a three year-old to share a bedroom with his mother. Certainly Chancellor Davidson does not

believe that parents who let their pre-school age children sleep in the bed with them should lose custody or that it somehow makes a parent a less fit and suitable person to have custody.

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

Pursuant to this factor, the Court should have discussed the issue of having a freshly-paroled, convicted drug felon living in the paternal grandmother's home where the child spends a minimum of 1-2 hours a day. Further, the Court should have discussed the apparent abundance of cigarette smoking going on by Thomas and his mother around the child when they were the ones who were criticizing the Mother for her supposed lack of concern for the child's breathing difficulties.

As is clear from reviewing the testimony and the Court's final ruling in this matter, Ms. Wheat was not given equal consideration. Things which tended to go against the Father are not discussed anywhere in the Court's judgment. The focus of the Court's ruling was centered entirely on how the Mother was somehow unfit. Yet, interestingly enough, nowhere did the Chancellor find that Erica Wheat is not a fit and suitable person to have custody of the child. And while the Court correctly encouraged the parties to work together on a suitable visitation schedule, he put one in place which virtually takes the Mother out of the child's life. If after hearing the immaturity of the Father in his opinions and the bizarre, rambling testimony of his mother, the Court honestly believed that they would work with Erica to establish a visitation schedule, it is unclear how he could have arrived at that conclusion.

Even more perplexing is how the Court encouraged the parties to work together on a visitation schedule when all the evidence before the Court was that they had already done that very thing. Yet, the Court substituted its judgment for the judgment of the parents. Both Erica Wheat and Thanasis Koutsovalas testified that for the past six months that their schedule as they

had set it up was working very well. The Father's legitimate concern was that the Mother's lifestyle choices might be endangering the child. However, no one disputed that Erica has seemingly put that bump in the road behind her and is doing all she can to be a productive member of society. She was thusly rewarded by the Chancellor with going from having her son 50% of the time to 13% of the time. The parties had agreed on a schedule that was working for them. The Chancellor imposed his will on the parties in such a fashion as to go completely against what the parties agreed had been working very well. The Chancellor's decision based on the Albright factors was clearly erroneous, manifestly wrong, and an abuse of discretion. No Court should substitute its judgment for the agreed judgment of the parents except in the most extraordinary of cases. This is not one of those cases.

II. WHETHER THE CHANCELLOR'S FINAL ORDER GRANTING CUSTODY TO THE FATHER IS IN ERROR DUE TO ITS AMBIGUITY.

In Chancellor Davidson's Opinion of the Court, he writes, "The Court has applied each of the factors outlined in Albright and considered the totality of the circumstances as shown by the evidence at trial and based on an analysis of those factors, the Court finds that custody of the minor child shall be awarded to the father." (R.E. 4, Pg. 14-15). In the Court's Order, the Chancellor writes, "Consistent with the Opinion incorporated into this Order, custody of the minor child, THOMAS JOHN KOUTSOVALAS, is awarded to the father, THANASIS KOUTSOVALAS. (R.E. 3, Pg. 4).

The word "custody" has two meaning under the law of this state. There is legal custody, and there is physical custody. Obviously, the Chancellor awarded primary physical custody to the Father. That decision is discussed by the Appellant under the first assignment of error. However, the Court remained silent in its ruling regarding the legal custody of the minor child.

The testimony on this issue was in conflict, and the Court should have articulated its reasoning if it in fact intended to strip the Mother of legal custody rights regarding the child. The Mother testified:

BY MS. MALLETTE: Okay. Should you be a part of any decisions that are made with regard to the legal, medical, and educational needs?

BY MS. WHEAT: I should be a part of every decision made in my son's life, every decision.

BY MS. MALLETTE: Have you tried to make Tommy a part of every major decision that's been made?

BY MS. WHEAT: Yes.

(T. 107)

In direct contrast, Mr. Koutsovalas testified:

BY MS. MALLETTE: You don't think she should have any custody at all?

BY MR. KOUTSOVALAS: Not full custody, no, I don't.

BY MS. MALLETTE: Should she have --

BY MR. KOUTSOVALAS: Not with her habits.

BY MS. MALLETTE: Would she have any involvement in making decisions for the child?

BY MR. KOUTSOVALAS: No major decisions, no.

BY MS. MALLETTE: Okay. So you want to complete and total control and custody?

BY MR. KOUTSOVALAS: Yes.

(T. 83)

And with that brief exchange, the Father stated honestly what the entire controversy was about. He wanted complete control. Unfortunately for Ms. Wheat, Chancellor Davidson gave him that control. In doing so, though, the Chancellor made no specific finding that Ms. Wheat

should be denied legal custody. Denying legal custody regarding a three year-old child to a Mother is beyond reason under these facts. At best, it is manifest error and a clear abuse of discretion. That said, the Appellant is left to wonder if that is what the Court did because "custody" seems very comprehensive yet it would be highly unusual under these facts to deny a Mother legal custody rights. The Court even remains silent on whether the Father has to *notify* the Mother of major decisions assuming the Father has the sole discretion to make those decisions. The ambiguity on this extremely important issue necessitates that the trial court's order be set aside.

CONCLUSION

The evidence in this case before the trial court was clearly insufficient for the Chancellor to reach the conclusion which he reached. This Court should find that the factual findings in this case are manifestly wrong, clearly erroneous, and/or an abuse of discretion. The Order of the Chancery Court should be set aside and the case remanded for reconsideration. All relief requested by the Appellant should be given to her, and the costs of this appeal should be assessed to the Appellee.

This the 13th day of August, 2009.

RESPECTFULLY SUBMITTED,

ERICA ROSE WHEAT

BY:

STEPHANIE L. MALLETTE
205 JEFFERSON ST, STE A
P.O. BOX 80170
STARKVILLE, MS 39759-0170
MSB 99200
Telephone: 662-320-4411

CERTIFICATE OF SERVICE

I, Stephanie L. Mallette, attorney for the Appellant, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the following:

Timothy Hudson
Counsel for Appellant
P.O. Box 648
Columbus, MS 39703

Honorable H.J. Davidson, Jr.
Chancery Court Judge
P.O. Box 684
Columbus, MS 39703-0684

This the 13th day of August, 2009.

STEPHANIE L. MALLETTE

CERTIFICATE OF MAILING

I, Stephanie L. Mallette, attorney for the Appellant, do hereby certify in accordance with M.R.A.P. 25 (a), that I am this day depositing in the United States Mail, first class, postage-prepaid, one original and three copies of the Brief and Record Excerpts in the matter *Erica Rose Wheat (Appellant) v. Thanasis G. KOUTSOVALAS (Appellee)*, case number 2009-CA-00074 for filing with the Clerk of the Supreme Court/Court of Appeals.

This the 13th day of August, 2009.

STEPHANIE L. MALLETTE