IN THE SUPREME COURT OF MISSISSIPPI

COURT APPEALED FROM: Chancery Court

COUNTY: Rankin

TRIAL JUDGE: John S. Grant III

TERESSA C. CURRY — APPELLANT

VS. — CASE NO. 2009-CA-00577

JOSEPH MCDANIEL — 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 disqualification or recusal.

(1) Judge John S. Grant
Chancellor Rankin County

(2) John S. Grant IV.
Son of Judge Grant and
Clerk for Judge Maxwell
Mississippi Court of Appeals

(3) Honorable Mike Younger
Counsel for Appellee

(4) Honorable Chris Tabb
Trial counsel Teressa Curry Prince

Randy A. Clark
Attorney of record for
Teressa Curry Prince

TABLE OF CONTENTS

TABLE OF CASES

ADDENDUMS

STATEMENT OF THE ISSUES

I.

The Chancellor committed manifest error in not treating this case as solely one of Modification of custody.

II.

Had the Court use the proper standard of Modification, Joseph would not have prevailed.

III.

The Chancellor committed manifest error in considering testimony he had previously held inadmissable.

IV.

The Chancellor considering evidence of Teressa's disability was discriminatory and in violation of the spirit of Federal Law.

V.

The Chancellors Albright analysis's was fatally flawed.

STATEMENT OF THE CASE

This case is a child custody case involving a minor child by the name of Carrie N. Hamilton, a female child born March 23rd, 2001. Carrie's mother is Teressa C. Curry (Prince) hereinafter "Teressa" and the father is Joseph R. McDaniel, hereinafter "Joseph". Depending on how this Court may rule, this case is either one of a modification of custody or is an initial Albright analysis.

This is an Appeal from what is titled a Judgment of Modification dated March 11th, 2009 in the Chancery Court of Rankin County, Mississippi. The Judgment of Modification is the last Order following the filings of many Complaints and Motions preceeding the Motion from which this Judgment was rendered.

Teressa and Joseph begat Carrie on March 23rd, 2001. Joseph and Teressa were not married. Joseph and Teressa did not live together and Teresa maintained the physical custody of Carrie. Both Teressa and Joseph have married other people and live in different states.

The following legal history is extremely important for this Court's later consideration of the issues:

A. On September 20th, 2001, Joseph executed under oath a stipulated agreement of paternity. It should be noted that a stipulated agreement for paternity is not an action wherein the Department of Human Services has sued Joseph, but rather, it is where Joseph voluntarily agreed to and stipulated to the Paternity of the minor child. This stipulated agreement of paternity became a Judgment of the Rankin County Chancery Court on November 7th, 2001, (RV1p3 RE 3-4)

B. An Order approving stipulated agreement of paternity was entered by the Chancery Court of Rankin County on November 8th, 2001. This stipulated Order declared Carrie to be the natural child of Joseph. The Order makes no mention of child support, custody or visitation. (RE 5)

C. March 28th, 2007, Joseph filed a Complaint for child support, visitation, name

change, and other relief in the Chancery Court of Rankin County. This Complaint requested only visitation with the minor child and that he, Joseph, be required to pay child support. This was a Complaint brought by Joseph and he was represented by counsel when this Complaint was filed. This Complaint being some six (6) years after the stipulated agreement of paternity. This Complaint did not request custody, nor did it request an initial custody determination. (RV1p1 RE 6-11)

D. The Chancery Court of Rankin County entered an Order on June 21st, 2007 awarding unto Joseph specific visitation rights with Carrie. Joseph was also required to pay an undetermined amount of money as child support. The Order only required him to pay 14% of his adjusted gross income. It is important to note, Joseph was awarded only visitation with Carrie. Custody was not specified. (RV1p47 RE 12)

E. Because Teressa is a recipient of certain benefits from the State of Mississippi which will be discussed in much greater detail later, the Department of Human Services sued Joseph McDaniel on November 1st, 2007 for child support.

F. Apparently in response to the above filing, Joseph, on December 12th, 2007 sued Teressa, in a Motion for Modification, for custody of Carrie (re). Again, Joseph was represented by counsel in the filing of this Motion for Modification. The filing of this Motion resulted in the Judgment from which this Appeal is taken. (RV1p66 RE 18)

SUMMARY OF THE ARGUMENT

Teressa alleges numerous errors committed by the Chancellor subjudice. Not only was the Chancellor in manifest error for failing to use the proper legal standard, but, he also considered inadmissable evidence, unfairly gave too much weight to Teressa's disability and improperly weighed the Albright factors.

The Chancellor began by approaching this case as an initial Albright analysis. The Chancellor recognized Teressa's defacto physical custody of the minor child but failed to give that physical custody the legal standing that he should have. Instead the Chancellor saw fit to treat this matter as a case where neither party had physical custody of the child. The record and facts clearly demonstrate that Teressa had the sole physical and legal custody of Carrie since birth. Keep in mind, this child was approximately eight (8) years old at the time of Trial and she had never been out of the custody of her mother. The Chancellor based his position on the fact that there had been no prior legal adjudication of physical custody.

This was a case of Modification requiring there to be:

A. A material change in circumstances,

B. Which adversely affects the child,

C. Requires a change of custody.

Instead, the Chancellor used it as Albright initial analysis requiring a much lesser standard. Although the Chancellor attempted to address both considerations it was obvious from the record and throughout the record that the Chancellor's approach was disjointed and confusing.

Joseph approached his case from the stand point that Teressa suffered from a degenerative eye disease which hindered her ability to effectively take care of Carrie. Joseph alleged that Carrie had a yeast infection while in her mother's care, had head lice on one (1) occasion while in her mother's care, failed Kindergarten while in her mother's care and had had a urinary tract infection while in her mother's care. This was the jist and substance of Joseph's

case. At no point was there a showing by Joseph, any other witness, or any expert that there had been a material change in circumstances which adversely affected this child and that these circumstances occurred while the child was in the mother's care. This case never should have made it past directed verdict.

In his considerations, the Chancellor gave undo weight to evidence which he had previously ruled in admissible. The Chancellor gave consideration to the fact that Teressa suffers from Reginitis Pigmentosa This is an eye disorder which attacks Teressa's eye sight and limits her ability to see. This disorder is one that is recognized by the American's with Disabilities Act and Teressa is a protected individual under this Federal Act. Teressa believes that the Judge's consideration of this information has caused her unintentional discrimination brought about as a result of the Judge's consideration.

The Judge's opinion was some sixteen (16) pages in length. Out of the sixteen (16) pages, only nineteen (19) lines was devoted to addressing the possibility of this case being a modification. The Chancellor did not even bother to address the fact that it was Joseph himself who filed a Motion for Modification alleging a material change in circumstances which requires a change in custody, but rather, the Chancellor moved directly to an Albright analysis. His Albright analysis was flawed.

ARGUMENT

I.

The Chancellor committed manifest error in not treating this case as solely one of modification of custody.

The ruling in *C.W.L. v. R.A. 03-CA-01794-COA(Miss 2005)* and *Romans v. Fulgham 05-CA-00873-COA(Miss 2006)* as applied to the facts and ruling, in the case at bar, has resulted in one of the harshest rulings I have ever seen visited upon an innocent parent.

Teressa will be arguing three (3) things concerning this assignment of error. First, Teressa will be asking this Court to overrule *C.W.L. v. R.A.* and *Romans v. Fulgham*. Second, she will be asking this Court to modify these holdings and adopt as other states have, the test of "custodial environment". Third, Teressa will argue that her facts are distinguishable from *C.W.L. v. R.A.* and *Romans v. Fulgham*.

Carrie, the child herein, has lived only with her mother, Teressa, since birth. This fact is admitted to and confessed by Joseph in his different pleadings (RV1p17, RE 9, 18).
It is Teressa that put this child to bed each night. It is Teressa who fixed almost every meal this child has ever eaten. It is Teressa who has signed each and every document necessary for Carrie's care, i.e. doctor's consent, school registrations, etc. It was Teressa who has calmed this child's fears at night after a bad dream. Except during Joseph's visitation, which he rarely exercised, this child has been with her mother everyday of her eight (8) year life.

The Chancellor, at no point, seriously considered this case to be a modification case. This is evidenced by his opinion, which was sixteen (16) pages in length, with only nineteen (19) lines being devoted to the possibility of this being a Modification. (RE R156-157 RE 28-29). Further, the Judge

sub judice went through a curious line of questioning with Joseph wherein the Judge attempted to solicit testimony from Joseph concerning no prior Order of Custody (R60-63). From reading this exchange, it is easy to see what the Judge was thinking. Furthermore, the Chancellor consistently referred to Teressa having the defacto physical throughout the trial.

The holding in *C.W.L. v. R.A.* and *Romans v. Fulgham* is harsh and unmerciful in result and flies in the face of reality. These cases fail to take into account that someone must have the physical custody. A custody Order requirement is a mere fiction that denies the practical aspect of people's lives.

Judge Griffis, in his dissent, in *Romans v. Fulgham* ¶36 gave insightful language when he said

> *"The effect of this Court's holding here and in C.W.L., is that we have decided that it is acceptable for the father of an extramarital child to wait over seven (7) years, after he is judicially determined to be the child's father to ask for custody of his child. This was not the* holding in either law or S.B. *then, after this wait, this Court has decided that it is then acceptable to apply the Albright factors as if it were an initial determination of custody. I can not accept that as a proper result or acceptable law in the future."*

Teressa urges this Honorable Court to overrule *C.W.L. v. R.A.* and *Romans v. Fulgham* and the short line of cases involving this issue. To do otherwise, will be a goldmine of litigation for family lawyers by inviting unnecessary litigation and Appeals.

Should this Court not deem it proper to over rule these cases, then, Teressa would urge this Court to adopt the "Custodial Environment Test".

This test is used in other States. As persuasive authority Teressa would call this Courts

attention to Bednarski v. Bednarski 366 N.W. 2d 69 (MICH. 1985) and the Michigan Child Custody Act of 1970 (722.21-722.31) Michigan Code. Wherein the Michigan Court of Appeals and legislature defined "Custodial Environment" as "*The Custodial environment of a child is established over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment and the inclination of the custodian and the child as to permanency shall also be considered..... Under this section, once a custodial environment has been established, a Court must find clear and convincing evidence that a change of custody is in the child's best interest before a change maybe ordered.* "Lyons v. Lyons, 125 Mich. App. 626,632;366 N.W. 2d 844 (1983)".

Bednarski involves a dispute between grandparents and deaf parents. The grandparents allege, because of the parents deafness the children were being disadvantaged. There had been no prior judicial order between the grandparents and parents. The Michigan Court further said, "the evidence introduced indicated that three (3) year old Rebecca look to her mother for guidance, discipline, the necessities of life and parental comfort. The Trial Court erred in failing to find an established custodial environment and in not applying a clear and convincing evidentiary standard."

The adoption and application of this test would serve to temper the harsh results realized in C.W.L. , Romans and the case at bar. The application of this test would have required the standard for modification to be used. With this rule, this Court would not be revisiting this issue once again.

Teressa also argues that her facts and the Court record can be distinguished from *C.W.L. and Romans*.

First, let us examine and distinguish Teressa's court file:

1. Carrie was born March 23rd, 2001. On November 7th, 2001, Joseph and the Department of Human Services, hereinafter "DHS", entered into a Stipulated Agreement of Paternity "(R.v. 1, p3 RE 3). Joseph was not sued by DHS, he joined

in. Therefore, Joseph had his first invitation to make a claim for custody in 2001. DHS, it's true, does not have the authority to deal with custody, but, that does not prevent a litigate from asserting a claim at this time. DHS is only precluded from litigating the custody issue. It is also not sufficient for this Court to say as it did in *Romans* that Teressa was not a party to the DHS action. Certainly she was a party. DHS is only a third party beneficiary because of the benefits they extend to Teressa. If it was not for the fact that Teressa had a child there would be no DHS case. Further, not for the fact of Teressa's custody, DHS would not pursue and require Joseph to pay child support.

2. On March 28th, 2007, Joseph filed a "Complaint for Child Support, Visitation, Name Change and Other Relief" (V1P14RE 6). This is an action instituted by Joseph. It was the same cause number as the stipulated agreement of paternity. Joseph was represented by an attorney in bringing this Complaint.

This Complaint filed by Joseph and his attorney was Joseph's second invitation to ask for custody. He did not do so. Instead, he specifically asked the Court only for visitation. He even asked for specific visitation (V1P16RE).

Even more distinguishable, is the fact, that Joseph signed an Affidavit under oath that the child had lived with her mother for her entire life (V1P17RE 7).

This same Complaint, requested that he, Joseph be required to pay child support. By wanting to pay child support to Teressa, he accepts and acknowledges Teressa as the physical custodial parent.

3. On June 21st, 2007, an Agreed Order was entered, granting Joseph's request for visitation. Joseph signed off on the Order as did his attorney. He agreed to have only visitation, again, he failed to assert any claim for custody, even though he was represented with an opportunity to ask for custody (V1P47RE 12).

4. This pleading is the most distinguishable document for *C.W.L.* and *Romans* purposes and is also the most damaging to Joseph's position.

On December 12th, 2007, Joseph, under oath, filed a sworn Motion for Modification. Again, he was represented by counsel, but, different counsel. He, at this point, had two different lawyers examine his case and advise him on the law (V1P60RE 18).

It is interesting to note, at this point, Joseph only filed this Motion after Teressa had moved from the State of Mississippi.

The Motion only alleged a material change in circumstances. Joseph requested "Change in Custody." The Motion expressly did not request an Albright analysis or an initial determination of custody.

This case preceded to trial, the present record, with the Judge obviously trying this case as an Albright case with Joseph never asking for the Albright analysis.

Teressa would argue, at this point, that the Court should declare as plain manifest error the fact that the Chancellor gave relief not requested. It is not Chancellor's job to advocate for a litigante, nor is it his job to do the lawyer's job.

Neither *C.W.L.* nor *Romans* had a paper trial as exist in this case. Teressa's physical custody cannot be seriously contested.

5. The Court entered it's Judgment of Modification on March 11th, 2009. The Judgment made no specific findings (V1P78RE 20).

6. A timely Motion for Reconsideration was filed alleging the Court's failure to

recognize Teressa's defacto physical custody, that the Court proceeded to an Albright analysis without first finding a material change in circumstances requiring a change in custody and that the Court violated federal law by using Teressa's poor eye site as a reason to take her child(V1P74).

As stated earlier the Chancellor at no point seriously considered this to be a case of Modification. In his opinion the Court states, "what is required, under the law, for a Modification of Custody." Then, he goes on to say, "here, there hasn't been a custody award. So, what applies in a case like that? Well, in that type of case, we must go again to the Mississippi Case Law. And in this particular case, the case of Albright vs. Albright, a 1983 landmark Mississippi Supreme Court case, authored by then Justice Prather directs Chancellors to consider the Albright factors in awarding child custody, not in changing custody, but in making a custody decision."(R154-156).

Following this above quote, the Chancellor goes into his nineteen (19) line consideration of Modification (R156-157RE). Then, following this mere nineteen (19) lines of text, the Court again finds,

> "now, the Court, again, finds that there has not been any first time finding by the Court that there is any award of custody..... and in viewing this case as a straight custody case which in this particular instance the factors of Albright are relevant" (R157RE 29).

Therefore, from the above language it can be easily concluded that the Court considered this to be a straight Albright analysis and not a Modification case. The Court and the rest of it's opinion went onto an Albright analysis, which will be discussed later, without ever finding there had been a material change in circumstances which adversely affected this child and that it would be in the child's best interest to change custody. The Chancellor abandoned his responsibility by failing to use the proper standard.

Teressa would ask this Court to reverse the Chancellor and to render a decision declaring her to be the physical custodian of her child and to return her child to her. In the alternative, Teressa

would ask this Court to reverse and remand this matter to the Chancery Court for a new Trial solely , for a Motion for Modification of Custody.

II.

Had the Court used the proper standard of Modification Joseph would not have prevailed.

This Court has said, "in a case disputing child custody, the Chancellor's findings will not be reversed unless manifestly wrong, clearly erroneous, or the proper legal standard was not applied. Hensarling v. Hensarling, 824 So.2d 583, 587(Miss. 2002). See also Wright v. Stanley, 700 So.2d 274,280(Miss. 1997); Williams v. Williams, 656 So.2d 325,330 (Miss. 1995). The burden of proof is on the Movant to show by a proponderence of the evidence that a material change in circumstances has occurred in the custodial home. Riley v. Doerner, 677 So.2d 740,743 (Miss. 1996). In the ordinary Modification proceeding, the non custodial party must prove:

1. A substantial change in circumstances has transpired since issuance of the custody decree;
2. This change adversely affects the child's welfare; and
3. The child's best interest mandates a change of custody. Bubac v. Boston, 600 So.2d 951,955 (Miss. 1992).

In Re: E.C.P. 918 So.2d 809(Miss. 2005), the Court of Appeals found in that case that the Chancellor did not separate her findings of fact and conclusions of law in the necessary three (3) step analysis concerning Modification. Therefore, it is clear that the Chancellor in Teressa's case should have gone through the necessary analysis of a Modification case. His failure demands reversal.

The record in this case is short. A full reading of this short record is necessary for a complete understanding of the failure of the Chancellor to properly apply the proper legal standard.

The evidence through the record from several witnesses shows that while Carrie was in her mother's care suffered one (1) yeast infection, one (1) urinary tract infection, an allergy to cats, a broken arm, and one (1) lice infestation while Carrie was in the Pearl Public Schools. There was a complete failure by Joseph to show that Teressa was in anyway responsible and/or negligent in

Carrie's suffering the above events. Judicial notice can be taken of the fact, that children get sick, children have accidents, children break arms, and children get lice infestations and that no parent is responsible for these things.

Joseph completely failed in his burden of proof regarding the first prong of a Modification test. Joseph did not prove by a proponderence of the evidence that there had been a material change in circumstances occurring within Teressa's home. There was absolutely no showing that any of the things complained of were in anyway brought about by Teressa.

As to the second prong of the test that there was an adverse circumstance visited upon the child. Again referring to the above language, all children suffer childhood illnesses. Little girls get sick and suffer from yeast infections from taking antibiotics. It's no one's fault. There must have been shown a connection between something occurring in Teressa's home or care and the adverse circumstance suffered by the child. Here, there was no evidence that Teressa did anything wrong which resulted in sickness, lice, broken arm or failure of five year old Kindergarten. Even if the first two prongs had been met, Joseph would have been required to provide proof that a change of custody would be required. Remember, Joseph had the burden of proof. He introduced no proof or testimony as to this third prong.

There was no case for modification and this Court should reverse and render a Judgment in Teressa's favor.

III.

The Chancellor committed manifest error in considering testimony he had previously held inadmissable.

and

IV.

The Chancellor considering evidence of Teressa's disability was discriminatory and violation of the spirit of Federal Law.

Teressa believes that it will be more concise to argue assignments three (3) and four (4) together as they deal with the same information.

As previously stated, Teressa suffers from a degenerative eye disease, Reginitis Pigmentosa.

This disease is progressive in nature and over the course of many years will rob Teressa of her eye site. Teressa had already suffered from this disorder for many years before the birth of Carrie and this was not an event arising after Carrie's birth.

Early on in the Trial, counsel for Joseph had first called Teressa adversely. Counsel for Joseph began a line of questioning concerning Teressa's eye sight. At one point, he tendered a question concerning whether or not Teressa had driven an automobile with Carrie inside. Counsel for Joseph made a timely objection that the information was prior to the last Court Order being entered. The Chancellor sustained Teressa's objection and held this information inadmissable. Therefore, the Chancellor should have been precluded from later considering this testimony which he had already held inadmissable (R10).

Later in the Trial, again under examination by counsel for Joseph, a line of questioning was began which involved Teressa driving an automobile. This line of questioning should not have been allowed by the Chancellor. The objection had been previously made and the Chancellor had sustained the objection earlier in the Trial. Therefore, the objection had already been preserved. The Chancellor improperly allowed this information into evidence (R141-142).

After both counsel had finished their questioning of Teressa, the Court began a concerning line of questions about Teressa's vision. It was obvious from the Court's questions, that the Court was placing great weight on Teressa's disability (R147).

After the Court had questioned Teressa, the Court tendered her back to counsel for any questions concerning information elicited by the Court. Counsel for Joseph again began questioning Teressa about her eyesight. Counsel for Teressa immediately renewed his objection as to relevance. This time, the Court, curiously, overruled Teressa's objection and found that testimony concerning her eyesight to be relevant. Again, by the Court's ruling, the Judge is showing the great weight he is placing on Teressa's disability (R149).

Most disturbing, in his opinion, the Court repeatedly refers to Teressa's disability. First, the Court directly refers to testimony, which he had previously ruled inadmissable concerning Teressa allegedly driving an automobile (R160). The Judge immediately following this comment accuses Teressa of being in a "high emotional state". This was in reference to her driving an automobile. This statement being used by the Judge is no where in the record and Teressa is very concerned about where this statement by the Judge originated. It simply did not occur in the Courtroom and on the record. Furthermore, the Judge had already ruled this information inadmissable but yet he is referring to this alleged incident. An incident that simply was not proven. The Judge accuses Teressa of poor reason and poor parenting skills. This is a direct comment on Teressa's disability. From the Judge's statement we can conclude, because Teressa has a disability she therefore has poor reason and poor parenting skills. This statement by the Judge is outrageous and obvious manifest error(R160-161).

In light of the Judge's initial barring of testimony concerning Teressa allegedly driving a car, the Court was in plain error for allowing and considering this information later in the Trial. He was certainly in plain manifest error for considering this inadmissable testimony in his opinion.

From the research conducted by Teressa no direct case law from Mississippi can be found concerning a parent's disability as it may relate to custody of a child. Therefore, Teressa must rely on persuasive authority.

The prior case cited by Teressa, Bednarski v. Bednarski out of the State of Michigan which she earlier used to urge this Court to adopt the "custodial environment" test was initially found by Teressa for use concerning the disability issue. Bednarski involved a custody dispute between grandparents and natural parents. The natural parents suffered from profound deafness. The grandparents believing their grandchild could not be properly cared for by deaf parents sued for custody. The Michigan Court of Appeals held "a Trial Court which is considering a parents physical disability or handicap as a factor in the award of child custody must avoid impairing or defeating the public policy favoring the integration of the handicapped into the responsibility and satisfactions of

family life, the cornerstone of our social system." Bednarski v. Bednarski at page 19. In Bednarski the Trial Court had removed custody of the child and awarded the custody to the grandparents. The Michigan Court of Appeals reversed the Trial Court's decision and referred to In re marriage Carney, 24 Cal3rd 725;157 Cal Rptr 383;598 p2d36(1979), saying "taking note of the strong State and Federal policies of pursuing the total integration of handicap persons into the mainstream of society, the Court stated:

> "No less important to this policy is the integration of the handicap into the responsibilities and satisfactions of family, cornerstone of our social system yet as more and more physical disabled persons marry and bare or adopt children.....custody disputes similar to that now before us may well occur. In discharging their admittedly difficult duty in such proceedings, the Trial Courts must avoid impairing or defeating the foregoing public policy. Bednarksi at 28.

Teressa would also, as persuasive authority, call this Court's attention to the American's With Disabilities Act at Title 42126 Section 12101. This Act enacted by Congress was a sweeping civil rights act to protect our most innocent citizens. While the Act addresses the issues of employment and public accommodation it certainly in spirit, gives guidance as to how the disabled should be treated.

Teressa argues that the Chancellor, unintentionally, placed undo weight upon her physical disability. It should be noted, there was not one shred of testimony or evidence taken that Teressa's poor eyesight in anyway hampered or harmed her child. It was inexcusable for the Chancellor to use Teressa's disability as a reason to deny her custody of her child. While the Chancellor gave other reasons in his Albright analysis, it is clear to Teressa that throughout his opinion the Court consistently went back to and gave great weight to her eyesight.

Teressa believes, what this entire case really boils down too, is the fact, that she has serious vision problems and Joseph does not. Therefore, because Joseph has no vision problems, he is the more fit parent. Is this the message our State wishes to send disabled persons? Teressa thinks not.

Teressa request this Court to find that the Chancellor committed an error in considering testimony which he had previously held inadmissable and for further giving undo weight to her physical disability, this Court should reverse and render a decision in Teressa's favor.

V.

The Chancellor's Albright analysis was fatally flawed.

While Teressa steadfastly maintains the Court sub judice should have never reached an Albright analysis. The case is a Modification case and never should have made it past directed verdict. But assuming for argument purposes, that the case would have made it past directed verdict and the Court would have needed to consider the Albright Factors. Therefore, Teressa will state the position of the Court on each of the Albright Factors and will argue each factor.

1. Age, health and sex of the child

As to the age, the Court found that this factor favored neither party. The Court found that the child was eight (8) years of age and not of tender years. As to the sex of the child, the Court found that factor slightly weighted in favor of the mother. As to the health of the child the Court seemmed to find this slightly weighed in favor of the father. The Court therefore found that the age, health and sex of a child really favored neither party and found it to be neutral. (R. 157-158)

Teressa takes exception. First, this little girl is only eight (8) years of age and by everyone's admission had been solely in the care and custody of her mother since birth. Remember, Joseph had even signed an Affidavit stating that Carrie had been solely in the care of her mother since birth. See (volume 1 P17RE) wherein Joseph signed an Affidavit stating that Carrie had lived with Teressa all her life. This Affidavit will also be important in another Albright factor.

Joseph had admitted on the stand, on the record, that he had not visited with Carrie in over a year. Further, Joseph's wife on the stand further testified that Joseph had not visited with Carrie and it was because it was long nine (9) hour drive for this man to see his child, (R84 and R48-49, RE).

Because this little girl, only eight (8) years of age, has only been with her mother all her life it would be only natural to conclude that because of the little girl's young age and having known her mother, this factor, age, would heavily favor Teressa.

Teressa agrees with the Court's finding that the sex of the child favored her but would state that the sex of the child should have heavily favored her.

There is no doubt that this little girl, as stated previously, has suffered from a urinary tract infection, a yeast infection, a lice infestation and a broken arm. Well, she has only been in the custody of her mother, and all children are going to suffer some illnesses and some injuries, one (1) urinary infection and one (1) yeast infection and one (1) problem with lice should not have been a factor which weighed in favor of the father. Simply put, the child would have suffered illnesses in the father's care as well. If anything, this factor should have been neutral. Therefore as to factor number one (1) the overall finding should have been that it weighted in favor of Teressa.

2. Continuity of care.

The Court found that this factor weighted in favor of neither party as it had no evidence reported to conclude which party had the continuity of care (R. 158). Teressa takes strong exception to this finding.

Again, Teressa would call your attention to the above factor and the Affidavit signed by Joseph (V1p17, Re). It's can be seriously disputed, that Teressa is the only parent who had the continuity of care for this child all her life. The child had never been in anyone else's care other than Teressa, this little girl made it to age eight (8). Someone fed her, someone put clothes on her, someone took her to doctor appointments, someone took her to church, someone provided all the love and care that this child needed to make it to age eight(8). By Joseph's own admission, it was not him. There was ample and substantial evidence for the Court to consider. The Court only needed to refer to the Court file which was in front of it. This factor weighs very heavily in Teressa's favor and the Court should have found so.

3. Parenting Skills

The Court gave a somewhat meaningful consideration to this factor.
The Court found that this factor slightly favored the father. (R. 159-161)

Again, Teressa would call this Courts attention to the Court's consideration of this factor and remind this Court of the fact that the Chancellor is in part considering testimony which it had earlier ruled inadmissable and is giving undo weight to the mother's disability. The Court then gives Mr. McDaniel a free pass in not considering his unclean hands. It was undisputed that Joseph had not been paying his child support and that he was in serious arrearage with his child support (R35-40). Because unclean hands had specifically not been pled by Teressa, the Court in it's opinion, refused to consider this factor in it's Albright analysis. Teressa would argue that it would not be necessary for the Court to find Joseph guilty of unclean hands in order to consider the fact that the man had not been supporting his child. The Court should have given this it's due weight and consideration. The Court could have easily found that the man was being a bad parent by not properly supporting his child as he was legally obligated to do. Unclean hands simply means that a litigant can be denied relief because he was guilty of unclean hands. It would not be necessary for the Chancellor below to deny any relief to Joseph because of his unclean hands. But it certainly was something the Court should consider in it's Albright analysis.

Again, as to this factor, Teressa was the only person to have this child in her care for eight (8) years. The child was healthy and doing well and this factor should not been held against Teressa.

4. Willingness and capacity to provide primary care.

The Chancellor completely failed to address this issue. But again, it was only Teressa who had Carrie in her care all of the child's life.

5. Employment of the parents and responsibilities of employment

The Court seemed to blend the stability of home environment with the employment factor. But, the Court found that as to employment it favored Joseph. Again, with great concern by Teressa, the Court once again referred to Teressa's disability and the fact that she cannot work and he

weighted this factor in favor of Joseph. Therefore the Court used Teressa's disability as a factor in denying her custody of her child. (R 164-165)

The truth is, because Teressa does not work, she is always home and is therefore always available for Carrie. When Carrie arrives home from school, momma is there. When Carrie needs to do her homework after school, momma is there. Therefore, this factor actually weighs very heavily in favor of Teressa, because, her not working allows her to always be there for her child. The Court should have found this factor weighing heavily in favor of Teressa.

6. Physical and mental health and age of parents

The Court found that age favored neither party. Teressa acccepts this. The Court also found that mental health would favor neither party. Again, Teressa accepts. But then the Court goes on to heavily weigh against Teressa, the issue of physical health. The Court found that physical health weighed in favor of the father. Although the Court says "through no fault of her own, Ms. Curry suffers from a debilitating vision problem". The Court is therefore holding her disability against her in consideration of this factor. (R. 162-163)

Teressa emphatically states that throughout this short record, there is not one shred of supported evidence that indicates that her vision problem has anyway hindered her ability to be a good mother. Other than her eyesight problem, there was no other testimony concerning any other health issue with Teressa which would affect her ability to exercise the full custody of Carrie.

This factor should have been ruled neutral by the Chancellor.

7. Emotional ties of parent and child.

The Court only gives six (6) lines in it's opinion to this factor and rules this factor to be neutral. (R. 162)

Teressa would state that because of her unquestioned sole custody and possession of this child over the child's eight (8) years of life the Court should have realized that the emotional ties between daughter and mother would be very close. Of course this little girl loves her father and of course her father loves her but that doesn't mean that his emotional ties are as great as the mother

daughter tie. The Court should have given more consideration to this factor.

8. Moral fitness of the parents

The Court found that on the issue of moral fitness that it was neutral and favored neither party (R. 162). Again, Teressa would urge this Court to declare that the Chancellor should have considered Joseph's failure to support his child financially and that it would certainly be a moral failure on his part by refusing to financially support his child. This factor should have weighed in favor of Teressa.

9. Home school and community record of the child.

The Court found that the school and community record favored neither of the parties. (R. 163) However, the Court declared the home factor to favor Joseph by saying he has a traditional family in place. Well, what does the Court think that Teressa has in place. She has the same traditional family in place as Joseph. She has a husband, she has children and the children have a step-father who is close by to help when Teressa cannot.

The Court, in this factor again all goes back to Teressa's disability and gives her disability unfair and undue weight.

10. Preference of the child.

The Court found that this factor favors neither party (R. 164). Teressa takes no exception.

11. Stability of home environment and employment of each parent.

The Court finds that the home environment favored neither parent. But, again, as previously discussed the Court finds that the employment favors the father and again discusses Teressa's disability. (R. 163)

Also under this factor the Court considers the fact that Carrie has a half blood sibling in Teressa's home but chooses to be willing to separate Carrie and her sibling. This Court in Arnold v. Conwill, 562So. 2d97,100 (Miss. 1990)stated "the Court shall try to keep the children together in a

family unit because the love and affection of siblings is very important and to deprive them of this association is not in their best interest. Sparkman v. Sparkman, 441 So.2d 1361,1362 (Miss. 1983)".

This Court has ruled time and time again that siblings should remain together. There can be no dispute but that Carrie and her sibling have been together all of Carrie's life. The Court gave little consideration to the impact that this separation would have on Carrie and/or the other child. The Court found that this was only a slight favor to the mother.

12. Other relevant factors.

The Court then considered the poll star consideration, the best interest and welfare of the child and the Court found that this general factor weighted in favor of the father and so much so that it was in Carrie's best interest that custody be placed with him. (R. 165)

Teressa would urge, that from the above analysis the Court should have concluded that it would be in the best interest of Carrie to be in the mother's care, custody and control as she had been all her life without any material change occurring.

As to this assignment of error Teressa request this Court to declare the Chancellors Albright analysis to be manifestly flawed and to reverse and render a decision in her favor.

Conclusion

Teressa strongly believes that the Court took her child away from her because of her disability. Teressa believes, that a through reading of the record, supports her position. There just is no other explanation. Teressa does not state and does not believe that the Chancellor sub judice set out with an intent to discriminate against her because of her disability but that the ruling has the same affect.

This case was a modification of custody case. The standard for a Modification should have been used by the Chancellor. The proper standard would have resulted in custody remaining with Teressa. This Court should reverse and render a decision in favor of Teressa.

Respectfully submitted,

RANDY CLARK

CERTIFICATE OF SERVICE

I, the undersigned attorney, do certify that I have this day mailed, via United States Mail, postage pre-paid, a true and correct copy of the above and foregoing *Brief* to the following:

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This the 2nd day of September, 2009.

RANDY A. CLARK

722.27
Chapter 722 CHILDREN
CHILD CUSTODY ACT OF 1970 (722.21 - 722.31)

722.27 Child custody disputes; powers of court; support order; enforcement of judgment or order.

Sec. 7.

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, the court may also order support as provided in this section for a child after he or she reaches 18 years of age. The court may require that support payments shall be made through the friend of the court, court clerk, or state disbursement unit.

(b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parents is governed by section 7a.

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. Upon a parent's return from active military duty, the court shall reinstate the custody order in effect immediately preceding that period of active military duty. If a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in a best interest of the child determination.

(d) Utilize a guardian ad litem or the community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes.

(e) Take any other action considered to be necessary in a particular child custody dispute.

(f) Upon petition consider the reasonable grandparenting time of maternal or paternal grandparents as provided in section 7b and, if denied, make a record of the denial.

(2) A judgment or order entered under this act providing for the support of a child is governed by and is enforceable as provided in the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650. If this act contains a specific provision regarding the contents or enforcement of a support order that conflicts with a provision in the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650, this act controls in regard to that provision.

History: 1970, Act 91, Eff. Apr. 1, 1971;-- Am. 1980, Act 161, Imd. Eff. June 18, 1980;-- Am. 1985, Act 215, Eff. Mar. 1, 1986;-- Am. 1988, Act 377, Eff. Mar. 30, 1989;-- Am. 1989, Act 275, Imd. Eff. Dec. 26, 1989;-- Am. 1990, Act 245, Imd. Eff. Oct. 10, 1990;-- Am. 1990, Act 293, Imd. Eff. Dec. 14, 1990;-- Am. 1996, Act 19, Eff. June 1, 1996;-- Am. 1998, Act 482, Eff. Mar. 1, 1999;-- Am. 1999, Act 156, Imd. Eff. Nov. 3, 1999;-- Am. 2001, Act 108, Eff. Sept. 30, 2001;-- Am. 2005, Act 328, Imd. Eff. Dec. 28, 2005

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings

The Congress finds that

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Sec. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553, provided that:

(a) Findings

Congress finds that–

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes

The purposes of this Act are–

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Sec. 12102. Definition of disability

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major Life Activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating,

sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)

(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

Sec. 12103. Additional definitions

As used in this chapter

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.