IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2009-CA-01390

THERESA N. REED and IRENE DANIELS
Appellants

v.

MARVIN F. FAIR
Appellee

BRIEF OF APPELLEE

On Appeal from the Copiah County Chancery Court

Oral argument is not requested.

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

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

Theresa N. Reed
Appellant/Defendant

Irene Daniels
Appellant/Defendant

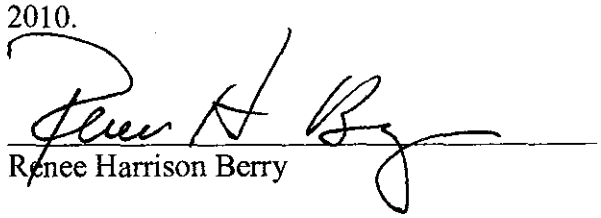
Marvin F. Fair
Appellee/Plaintiff

Renee Harrison Berry
Trial attorney for Marvin F. Fair

Felicia Perkins
Appellant attorney for Theresa Reed and Irene Daniels

Honorable Edward E. Patten, Jr.
Chancellor, 15th Chancery Court District

SO CERTIFIED, this the 16th day of April, 2010.



Renee Harrison Berry

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STATEMENT OF THE ISSUES

1. Whether the Chancellor applied the correct legal standard in making an initial custody determination under *Albright* as between unmarried parents.

2. Whether the Chancellor correctly analyzed the *Albright* factors.

STATEMENT OF THE CASE

On April 28, 2009, Marvin Fair filed a complaint seeking custody of his son, Marquavion Fair, now twelve years old. C.P. at 1. After service of process was had upon the Defendants, Theresa Reed and Irene Daniels, an order of continuance was entered in on May 22, 2009, and re-setting the matter for trial on July 28, 2009, which allowed the Defendants ample time to hire an attorney. C.P. at 1. On July 28, 2009, the Appellants, Theresa Reed and Irene Daniels, appeared late for court and without an attorney. T. at 2, 10. The Chancellor heard testimony from Marvin Fair, Theresa Reed, Irene Daniels and other witnesses and awarded full legal and physical custody to Marvin. T. at 71.

STATEMENT OF FACTS

Marvin Fair and Theresa Reed had a son, Marquavion Fair, born on June 26, 1997. T. at 4. They were not married at the time of the child's birth and were not subsequently married. T. at 4. The child has lived primarily with his great-grandmother, Irene Daniels, since his birth. T. at 5, 33, 41, 42, 43, and 52.

In July 2008, Marvin moved to Texas with his wife and their two children for better employment opportunities, living conditions and schools for his wife and children. T at 8. Prior to that move, he had a close relationship with Marquavion, visiting with him often and helping with his school activities, and paying child support. T. at 5, 10.

In October 2008, Marquavion was sexually abused by his first cousin, Michael McIntosh, Jr., who was also living in the home with him at Irene Daniels's house. T. at 22, 53. McIntosh was indicted in June 2009 in the Circuit Court of Copiah County, Mississippi, on three counts of

sexual battery of Marquavion and two of his first cousins, Brian Reed, Jr. and Kendarius Reed, who were also present in the home of Mrs. Daniels a great deal of time.[1] T. at 6-7; R.E. at 11.

Upon learning from a third party of these crimes committed against his son in April 2009, Marvin Fair filed for full custody of Marquavion. T. at 13. He did not seek custody of Mariah Shonay Reed, the child Theresa alleges is Marvin's daughter, as his paternity has never been established and Reed gave "general custody" of this child to her aunt, Eunice Belton. T. at 39.

Reed and Daniels testified that when McIntosh came to them from California, he was in the juvenile court system there and had a number of problems, none of which they were aware before bringing him to Irene Daniels's home. T. at 47, 49. Furthermore, they did not seek to educate themselves fully concerning McIntosh's problems. T. at 48, 49, 54. Even after learning of the criminal allegations of sexual battery against Marquavion and the other boys, Theresa and Irene Daniels wanted only treatment for McIntosh and not punishment. T. at 39, 50.

Theresa is not married to the fathers of any of her five children. T. at 53. She is employed only part-time and lives in a two-bedroom apartment. T. at 40. She does not have custody of all of her five children. T. at 39. She has given general, but presumably not legal custody of her youngest daughter to her aunt, T. at 39, and has sent Marquavion to live with his great-grandmother, Irene Daniels, for about "seventy-five percent" of his life by her own estimate. T. at 41, 42.

Marvin is married to the mother of his other two children and lives in a suburb of Austin, Texas, where he is employed full-time as a computer technician. T. at 9. His wife works at the after care facility where their children attend after school. T. at 16. Marvin is available in the afternoons after school to assist his children with their homework. T. at 16. His brother's family

[1] McIntosh pleaded guilty in the Circuit Court of Copiah County on October 5, 2009, to one count of sexual battery of a child and was sentenced to twelve years in custody of the Mississippi Department of Corrections. He is to serve the first four years and the remaining eight years were suspended on post supervision release. *See* http://www.mdoc.state.ms.us/InmateDetails.asp?PassedId=153297.

lives nearby and is available as a network of support for him. T. at 21. Marvin has access to excellent health care facilities and schools. T. at 16, 19, 20. He also has in a home that will allow Marquavion to have a bedroom and a proper bed in which to sleep. T. at 14. Both Theresa and Irene consider Marvin a good father to Marquavion. T. at 33, 58.

At the conclusion of this initial custody determination hearing, the Chancellor conducted an *Albright* analysis as between the natural parents of the minor child, Theresa Reed and Marvin Fair, and found that the age of the child, sex of the child, health of the child, moral fitness, capacity to provide primary care and other relevant factors; and that a totality of the circumstances favored Marvin. R.E. at 5-8. The Chancellor found that **none** of the factors favored Theresa. R.E. at 5-8 (emphasis supplied). The Chancellor also found that neither party was favored on the factors of continuity of care prior to the custody determination; best parent skills; employment responsibilities; emotional ties to the parent; home, school and community record; and stability of the home mainly because Marquavion lived with a third party, Mrs. Irene Daniels, for most of his life. R.E. at 5-8. Thereafter, Chancellor awarded full legal and physical custody to Marvin Fair. R.E. at 8.

SUMMARY OF ARGUMENT

Marvin Fair sought custody of his twelve-year-old son when he learned the child was a victim of sexual battery while living with his great-grandmother, Irene Daniels. His mother, Theresa Reed, had sent him to live with Irene Daniels for the vast majority of his life. The Chancellor correctly applied the "polestar consideration" of the best interest of the child through an *Albright* analysis, since there had never been a custody order concerning this child entered. Appellants argue that twelve years was too long to wait for Marvin to seek initial custody. Appellants correctly state that the law in this matter is well settled in that a Chancellor need not first determine there has been a material change in circumstances in an initial custody case

between unmarried parents. More importantly, this Court has never determined that any certain time period was too long for an initial custody petition. In this case, the petition came about after the 11-year-old child was sexually molested by his first cousin in the home in which his mother had chosen for him to live without her.

The Chancellor did not err in making this initial custody determination without first determining that a material change in circumstances had occurred. Furthermore, the Chancellor correctly examined the *Albright* factors in finding that based on the totality of the circumstances, the minor child's best interests were served by Marvin's having legal and physical custody.

LAW AND ARGUMENT

Standard of Review

"'In child custody matters, review by this Court is quite limited in that the Chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard in order for this Court to reverse.'" *Romans v. Fulgham*, 939 So. 2d 849, 851 (¶ 2) (Miss. Ct. App. 2006) (quoting *In re Custody of M.A.G.*, 859 So. 2d 1001, 1004 (¶ 8) (Miss. 2003); *M.C.M.J. v. C.E.J.*, 715 So. 2d 774, 775 (¶ 10) (Miss. 1998)). Where a chancellor has applied the correct legal standard and made findings of fact which are supported by substantial evidence, this Court will not reverse that decision. *See Romans*, 939 So. 2d at 851.

Unless a chancellor "improperly considers and applies the *Albright* factors, an appellate court will not disturb the chancery court's findings." *Hollon v. Hollon*, 784 So. 2d 943, 946 (¶ 11) (Miss. 2001).

Legal Standard

"In *Law v. Page*, the Mississippi Supreme Court stated that the appropriate legal standard to apply in custody actions dealing with an illegitimate child, when there has been no prior custody determination, is that found in divorce proceedings, which is the best interest of the child

considering the *Albright* factors." *Romans*, 939 So. 2d at 852 (¶ 4) (citing *Law v. Page*, 618 So. 2d 96, 101 (Miss. 1993). "The father is deemed on equal footing with the mother as to parental and custodial rights to that child." *Law,* 618 So. 2d at 101. "In original custody determinations, the 'polestar consideration' is the best interest and the welfare of the minor child." *Romans*, 939 So. 2d at 851 (¶ 3) (citing *Brekeen v. Brekeen*, 880 So. 2d 280, 283 (¶ 5) (Miss. 2004); *Carr v. Carr*, 480 So. 2d 1120, 1123 (Miss. 1985)).

1. Whether the Chancellor applied the correct legal standard in making an initial determination of custody of the minor child under *Albright.*

Theresa argues that this matter should have been treated as a modification of custody rather than as an initial determination of custody. She asserts that Marvin's waiting twelve years effectively waives his right to seek an initial custody determination. In fact, she made no mention of this argument during her direct testimony or cross-examination. Further, she did not cross-examine Marvin on this or any issue. T. at 23.

No court had ever made an initial determination of custody of this child. Therefore, the "polestar consideration" of the best interest of the child was the proper legal standard in this case. *See Romans*, 939 So. 2d at 851 (¶ 3). The Appellants cite the dissenting opinions in various recent decisions of this Court in support of her argument that the modification standard should apply. *See* Br. of Appellants at 7-8. Not one of the **majority** opinions in the cases cited by the Appellants requires a material change in circumstances to be established prior to an *Albright* analysis or set any period of time when it is inappropriate for an unwed parent to seek initial custody of a minor. This Court held in *Williams v. Stockstill*, that "there is no law to support a different burden of proof for fathers of children born out of wedlock who delay in seeking custody." *Williams v. Stockstill*, 990 So. 2d 774, 775 (¶ 8) (Miss. Ct. App. 2008).

As in *Romans*, this Court should reject Appellant's argument that because she had "de facto" custody of Marquavion for twelve years, the modification standard should apply. "Child

custody is a judicial determination." *Brown v. Crum*, 2010 WL 776471, No. 2009-CA-00310-COA (Miss. Ct. App. Mar. 9, 2010) (¶ 12) (holding that father did not waive his right to seek initial custody determination despite waiting nearly five years after acknowledging paternity to assert custodial rights) (citing *Gilcrease v. Gilcrease*, 918 So. 2d 854, 859 (¶ 8) (Miss. Ct. App. 2005)). The only prior judicial determination had concerning these parties and this minor child was a paternity and child support action through the Department of Human Services. T. at 5. Moreover, there is no "de facto" custody in our current law and it should not be adopted now. Therefore, the Chancellor was correct making an initial custody determination.

Even if the modification standard did apply, the fact that Theresa Reed did not have custody because Marquavion lived with his great-grandmother the majority of his life (T. at 42) and that he was sexually assaulted while in his great-grandmother's care (T. at 6, 33) are certainly material changes in circumstances that have adversely affected him and warranted a custody's being awarded to his father. Theresa allowed eleven-year-old Marquavion to decide whether he needed counseling to help him cope with his trauma at being raped and Theresa and Irene did not want the perpetrator punished for his criminal acts against this child. T. at 34, 39.

2. Whether the Chancellor correctly analyzed the *Albright* factors.

At the close of the hearing, the Chancellor conducted an *Albright* analysis as between the natural parents of the minor child, Theresa Reed and Marvin Fair, and found that the age of the child, sex of the child, health of the child, moral fitness, capacity to provide primary care; other relevant factors; and a totality of the circumstances favored Marvin Fair. R.E. at 5-8. Most interestingly, the Chancellor found that **none** of the factors favored Theresa. R.E. at 5-8. He found that neither party was favored on the factors of continuity of care prior to the custody determination; best parent skills; employment responsibilities; emotional ties to the parent;

home, school and community record; and stability of the home mainly because Marquavion lived with a third party, Mrs. Daniels, for most of his life. R.E. at 5-8.

Theresa argues that the Chancellor failed to take into account the fact that Marvin waited nearly twelve years to bring his custody action. "Although delay in asserting custody may be a factor to be considered in determining the best interest of the child, it is not the controlling factor." *Brown*, 2010 WL 776471 at *4 (¶ 16). In fact, the Chancellor did take this into account when he considered the "continuing care of the child prior to custody determination" factor under *Albright.* The Chancellor found that the factor favored neither Marvin nor Theresa because the child had been cared for by a third party most of his life. T. at 65.

While Theresa argues that Marvin's not paying the child's medical expenses was not taken into account, she cites no authority as to why or how it was reversible error not to consider it. She also takes issue about a second possible child between these two parties, but she admitted in her own testimony that this child's birth certificate does not bear Marvin's name and that she does not have custody of her either. T. at 39. The record is silent as to whether Theresa tried to obtain child support from Marvin for this second child or pay any herself to the general custodian.

Further, Theresa argues that the Chancellor's analysis of several *Albright* factors was incorrect. Theresa takes issue with the lack of documentary evidence concerning the child's dental and vision problems and her failure to seek counseling for the child after his sexual abuse. Theresa chose not to cross-examine Marvin about this issue when she was given the opportunity at trial. T. at 23. Nor did she present any evidence to the contrary herself. In her brief, Theresa states there was no evidence that Marquavion had been abused other than Marvin's testimony. Br. of Appellant at 12. In fact, Theresa, herself, testified that she spoke with Marquavion about the sexual assault and his feelings about it. T. at 34. She acknowledged the assault and the fact

that he might need counseling, but she let him decide whether he wanted counseling. T. at 34, 38. A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons. *See Williams*, 990 So. 2d at 778 (¶ 16).

Theresa takes issue that the Chancellor found no evidence regarding the "home, school and community record of the child" factor when the record shows he did well in school. The record is clear that Marquavion spent most of his life with his great-grandmother and Theresa surely cannot take credit for his doing well in school when he has not lived with her. T. at 5, 33, 41, 42, 43, and 52.

This Court has previously held that it "will not arbitrarily substitute [its] judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interests of the child." *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 2003). The Chancellor was correct in his *Albright* analysis and determination that legal and physical custody with Marvin was in the best interest of Marquavion Fair.

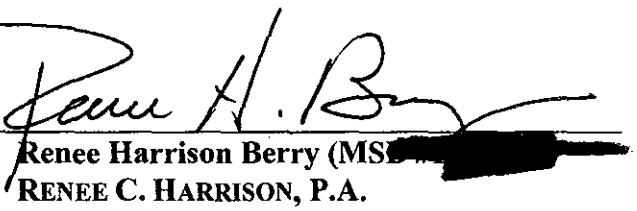
CONCLUSION

The Chancellor committed no reversible errors either in his use of the polestar consideration of the best interest of the child, his analysis of the evidence under *Albright*, or in his ruling in this case. Appellants have presented no prevailing authority supporting their argument that the de facto custody/modification standard should be the proper legal standard. Further, Theresa makes no compelling arguments that the Chancellor misapplied or misanalyzed the *Albright* factors. When considering the *Albright* factors and the totality of the circumstances in this case, clearly the Chancellor was correct in granting the legal and physical custody of Marquavion Fair to his father, Marvin Fair. This decision of the Chancellor should be affirmed. Further, this Court should not overrule existing case law and adopt a "de facto

custody"/modification standard in cases involving initial custody actions between unmarried parents with children born out of wedlock.

Respectfully submitted,

MARVIN F. FAIR, APPELLEE

BY: 

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CERTIFICATE OF SERVICE

I, Renee Harrison Berry, attorney for Appellee, do hereby certify that I have this date mailed in U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee*, to the following persons:

Honorable Edward E. Patten, Jr.
Copiah County Chancellor
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Felicia Perkins, Esq.
P.O. Box 21
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This, 16 day of April, 2010.

Renee Harrison Berry