IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2009-CA-01390

THERESA N. REED and IRENE DANIELS
Appellants

v.

MARVIN FAIR
Appellee

BRIEF OF APPELLANTS

On Appeal from the Chancery Court of Copiah County, Mississippi

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Submitted by:

FELECIA PERKINS, ESQ.
Mississippi Bar Numb[redacted]
LAW OFFICE OF FELECIA PERKINS, P.A.
P.O. Box 21
Jackson, Mississippi 39205-0021
(601) 352-5053
Counsel for Appellants

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 this Court may evaluate possible disqualifications or recusal.

Theresa N. Reed
Appellant/Defendant

Irene Daniels
Appellant/Defendant

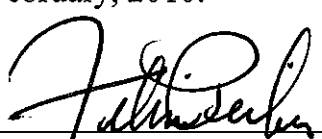
Marvin Fair
Appellee/Plaintiff

Renee Harrison Berry
Trial Attorney for Marvin Fair

Felecia Perkins
Appellate Attorney for Theresa N. Reed and Irene Daniels

Honorable Edward E. Patten, Jr.
Chancery Court Judge, Copiah County, Mississippi

SO CERTIFIED, this the 18th day of February, 2010.



Felecia Perkins

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3. **The Chancellor's analysis of other *Albright* factors was incorrect and not supported by the evidence.**

STATEMENT OF THE CASE

On April 28, 2009, Marvin Fair filed a compliant seeking custody of his then eleven-year-old son Marquavion. CP. 1. Named as defendants were Marquavion's mother, Theresa Reed, and great-grandmother, Irene Daniels. While Theresa and Ms. Daniels showed up at the hearing on July 28, 2009, neither was represented by an attorney. The Chancellor heard testimony and awarded full legal and physical custody to Marvin Fair. CP. 5. It is from that Judgment that Theresa Reed and Irene Daniels bring the instant appeal.

STATEMENT OF FACTS

Marvin Fair and Theresa Reed had a son born June 26, 1997. He was named Marquavion Teontay Fair. Marvin and Theresa were not married. In July 1999, Marvin began paying child support for Marquavion through the auspices of the Mississippi Department of Human Services. CP. 1 T. 5. Custody of Marquavion remained with Theresa. Later, Marvin and Theresa would have another child together: Mariah Shonay Reed.

In June of 2009, a person named Michael McIntosh, Jr., was indicted for having sexually abused three boys. One of those boys was Marquavion. Ex. 1. When Marvin Fair discovered this, he filed a complaint seeking custody of Marquavion. He did not, however, seek custody of Mariah.

Marquavion came in contact with Michael McIntosh at the house of Marquavion's great-grandmother, Irene Daniels. Ms. Daniels is Theresa Fair's grandmother and Marquavion would often stay with her. Ms. Daniels also took care of other relatives. In fact, Michael McIntosh was also Ms. Daniel's grandchild. One of Ms. Daniels' sons had two children by a woman; Michael was one of them. Their mother moved to California and refused to let Michael's father have anything to do with Michael other than pay child support. T. 47. When, at around the age of eighteen, Michael began getting into trouble in California, his father went to California and brought him back to Mississippi to live with Ms. Daniels since Ms. Daniels had successfully rehabilitated other children who had been left in her care. T. 47-48. For instance, one young man who had been drinking is now a paramedic. T. 48. Since Michael has been in Mississippi, he's been in therapy. T. 49.

When Michael was charged with having sexually abused Marquavion and two other children, it surprised everyone. As Ms. Daniels explained, no one had any idea of what sort of environment he had been raised in with his mother. T. 49.

> That boy, Mikey, has – we got Mikey, brought him here. We've been working with court systems and, I mean, with the DA and Mr. Bass and the school system , anything we could do. We were there every minute trying to see what we could do to salvage this kid – from – to pull him out from whatever he's been exposed to when he was in California, but it's 18 years. We haven't had him this long. We don't know anything about him. What we learned is what we anticipate each day as he stayed there

> with us. We find out these different problems and different things.

T. 49. Furthermore, Ms. Daniels was unaware of how the abuse could have happened in the house since the children were never unsupervised. T. 56-58. When Marquavion stayed at Ms. Daniels, he had his own bedroom. T. 15.

When Marvin, who was living in Texas with his wife and their two children, learned about the allegations of sexual abuse, he filed a complaint seeking custody of Marquavion. CP. 1.

After a hearing at which Teresa Reed and Ms. Daniels appeared unrepresented by counsel, the Chancellor awarded legal and physical custody of Marquavion to Mr. Fair. Theresa Reed was granted limited visitation contingent upon the Department of Human Services deeming that Ms. Reed had a "safe and suitable place in which to exercise visitation." CP. 9. In awarding custody to Mr. Fair, the Chancellor applied the Albright factors. In so doing, he found that the factors of age, sex, health, moral fitness favored Mr. Fair.

SUMMARY OF THE ARGUMENT

Marvin Fair did not seek custody of Marquavion until Marquavion was almost twelve years old. In determining custody, the Chancellor applied the best-interest-of-the-child analysis instead of first determining whether there had been a change in circumstances justifying a modification of custody. While this issue has been decided twice by the Mississippi Court of Appeals and that Court has twice decided that a Chancellor need not first determine whether there has been a change of circumstances in awarding custody, in neither of those cases did the non-custodial parent wait **twelve years** before requesting custody of the child.

Assuming for the sake of argument that the Chancellor was correct in applying a best-interest-of-the-child ("*Albright*") test without first ascertaining whether there was a change in circumstances, the Chancellor should have, at the very least, considered Marvin's twelve-year delay in requesting custody as a factor weighing against Marvin in the *Albright* analysis. The Chancellor should have also weighed against Marvin the fact that he had two children by Theresa but was requesting custody of only one.

Finally, the Chancellor erred in his analysis of several of the *Albright* factors. Factors which should have weighed in Theresa's favor were incorrectly found by the Chancellor to weigh in Marvin's favor.

LAW AND ARGUMENT

Standard of Review:

In reviewing the judgment of a chancery court, an appellate court "will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous." *Hamilton v. Hopkins,* 834 So.2d 695, 699 (Miss.2003). A chancellor's interpretation and application of the law, however, is reviewed de novo. *Tucker v. Prisock,* 791 So.2d 190, 192 (Miss.2001).

1. The trial court failed to determine that there was a change in circumstances prior to invoking the Albright factors.

Marquavion is Theresa's first child. She became pregnant with him when she was in the eleventh grade. She gave birth to the baby on June 26, 1997, and then went back and finished school. T. 35. Marvin Fair did not begin to pay child support until DHS intervened in 1999. T. 35. Apparently, there was never an order adjudicating custody or visitation. What this means is that Mr. Fair was amenable to allowing Marquavion to spend twelve years[1] in Theresa's Reed's custody without making any formal arrangements regarding custody or visitation. De facto custody, then, had been Theresa's for twelve years. The Chancellor in this case, instead of launching into an

[1]By the time of the hearing, Marquavion had turned twelve.

analysis of the best interests of the child, should have first determined whether there was a change in circumstances justifying a modification of custody.

This issue was presented to the Mississippi Court of Appeals in *Romans v. Fulgham*, 939 So.2d 849 (Miss. 2006). Romans involved a child born out of wedlock and a father who did not seek custody until seven years had passed since the birth of the child thereby leaving *de facto* custody with the mother. The Mississippi Court of Appeals affirmed the chancellor's use of the *Albright* factors without first determining that circumstances warranted a change in custody. The Court's decision, however, compelled three justices (Justices Griffis, Southwick and Chandler) to dissent. Appellants contend that this Court should overrule *Romans* and adopt the reasoning of Justice Griffis's dissent in that case. Or, at the very least, the Court should not apply *Romans* where, as here, the non-custodial parent delays twelve years before seeking custody.

As this Court is well aware, original custody decisions are made by the chancellor using the factors outlined in *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss. 1983).[2] Once there has been a custody determination, custody will not be

[2] The *Albright* factors are: (1) age, health, and sex of the child; (2) a determination of the parent that had the continuity of care prior to the separation; (3) which parent has the best parenting skills and which parent has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) the physical and mental health and age of the parents; (6) the emotional ties of parent and child; (7) the moral fitness of the parents; (8) the home, school, and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) the stability of the home

changed unless the noncustodial parent proves (1) there has been a substantial change in circumstances affecting the child; (2) the change adversely affects the child's welfare; and (3) a change in custody is in the best interest of the child. *Bredemeier v. Jackson*, 689 So.2d 770, 775 (Miss.1997).

In *Romans*, a child was born out of wedlock in November 1996. Six months later, paternity was established but custody was not addressed. It was not until September 2004 that the father filed for custody. The chancellor applied the various *Albright* factors and awarded custody to the father despite that fact that he waited seven years before seeking custody of his child. The mother appealed arguing that the chancellor should not have treated the father's petition as seeking an initial custody determination inasmuch as she had had custody these many years. The Mississippi Court of Appeals rejected her argument and upheld he chancellor's custody determination.

In his dissent, Justice Griffis framed the issue thusly:

> This case presents us with a difficult question that is unique to the relationship between the unmarried parents of extramarital children. The difficulty arises due to the involvement of DHS in the determination of paternity and our consideration of the future legal relationship between the parents, the child and the state. I am of the opinion that the chancellor applied an erroneous legal standard when he

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environment and employment of each parent; and (11) other factors relevant to the parent-child relationship. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

> treated Ryan Fulgham's petition for custody as an initial custody determination. The chancellor should have treated this case as a modification of child custody, and therefore, Ryan should have been held to a higher evidentiary standard.

Romans, 939 So.2d at 855. "The effect of this Court's holding", Judge Griffis continued, "is that we have decided that it is acceptable for the father of an extramarital child to wait for over seven years, after he is judicially determined to be the child's father, to ask for custody of his child." *Id.*

The Mississippi Court of Appeals reaffirmed its decision in *Romans* in *Williams v. Stockstill*, 990 So.2d 774 (Miss. 2008). This time, however, four Justices dissented: King, Calton, Griffis and Barnes. Justice King, joined by Justice Carlton, wrote:

> Where a child has an established and longstanding custodial relationship, I think the court must consider and address the issue of de facto custody. Under such circumstances, if, and only if, the court finds that there was no de facto custodian should it proceed to dispose of the case as a simple custody case.

Williams, 990 So.2d at 778.

In this case, Marquavion's father waited for twelve years (which was 3/4 of Marquavion's life as a minor) before seeking custody of him. Notwithstanding this delay, the Chancellor treated the issue of custody as an initial determination. While Mississippi Court of Appeal's precedent would agree with the Chancellor's decision to start with the *Albright* factors rather than first determining whether there was a

change in circumstances warranting a modification, this Court should either overrule *Romans* and *Williams* or distinguish this case from those based on the delay. The father in *Romans* waited seven years before seeking custody, the father in *Williams,* two. Here the father delayed seeing custody until the child was twelve. Given the length of this delay, the Chancellor should have first determined whether there was a change in circumstances before applying the *Albright* factors. His failure to do so was reversible error.

2. The Chancellor failed to take into account the fact that Marvin Fair waited twelve years before seeking custody of Marquavion or the fact that while he has two children by Theresa, he sought custody of only the one.

Even if the Chancellor was correct to apply the *Albright* factors without first determining whether the circumstances warranted a modification of custody, the Chancellor erred in failing to take into account the fact that Marvin waited 12 years before seeking custody of his child. This factor should have weighed heavily against Marvin's obtaining custody of Marquavion.

This fact might have been considered under the factor "Continuing care of the child prior to the custody determination." But instead of finding fault with Marvin for neglecting to pursue custody of Marquavion for twelve years, the Chancellor found that this factor favored neither Marvin or Theresa since "Ms. Reed has left the continuity

of the care to a third party and Mr. Fair has lived in another state for the last year." CP. 7.

According to Marvin, Marquavion had lived with Theresa's grandmother almost his entire life and Marvin had never objected to this arrangement before. Apparently, both Theresa and Marquavion lived with Irene until Marquavion was eight and Theresa moved out. T. 43. Not only did Marvin acquiesce to this arrangement, he admitted that Irene Daniels "did a great job with him." T. 22. As the dissents in both *Romans* and *Williams* point out, the father of an illegitimate should not be allowed to leave the care of a child solely to the mother for years and years and then attempt to acquire custody without his long delay being held against him.

Marvin also admitted that Marquavion's medical expenses throughout his life were covered by Medicaid. T. 10, 13. Apparently, Marvin had never sought to place Marquavion on his health insurance even though Marvin's employment provided such coverage. T. 9.

. Furthermore, the Chancellor failed to take into account that Marvin has two children with Theresa but only sought custody of the one. T. 32, 37. Apparently Marvin does not even pay child support for the second child. T. 32.

Where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Hollon v. Hollon,* 784 So.2d

943, 946 (Miss.2001). In this case, the Chancellor's failure to hold against Marvin his twelve-year delay in seeking custody of Marquavion as well as Marvin's failure to seek custody of his other child with Theresa should have weighed against Marvin in the *Albright* analysis. The Chancellor;'s opinion, then, should be reversed and the case remanded for a redetermination of the *Albright* factors.

3. The Chancellor's analysis of other Albright factors was incorrect and not supported by the evidence.

The Chancellor's analysis of several of the *Albright* factors was incorrect.

For instance, insofar as the factor involving the health of the child: the Chancellor found that this factor favored Marvin for the following reasons:

> Marquavion has some orthodontic and vision problems which have not been addressed by Ms. Reed; further, he is likely a victim of sexual abuse by an older male relative while living in the home of his great-grandmother, Irene Daniels, and Ms. Reed should have seen to Marquavion's receiving counseling and taking him to appointments to help him adjust and cope with this traumatic issue; that the factor has already sought out the services of a child psychologist should he receive custody and is prepared to pay any out of pocket expenses for Marquavion to receive counseling.

CP. 6-7. The only evidence and/or testimony that Marquavion suffered from orthodontic and vision problems was the testimony of Marvin. T. 8. Marvin

introduced no medical records or testimony from medical personnel that any of these things were true. *See, e.g., Hoskins v. Hoskins,* 21 So.3d 705, 709 (Miss.App.2009) (holding that trial court did not err in refusing to award fault-based divorce; although wife claimed she sought medical attention as a result of husband's cruelty, she presented no medical evidence); *Best v. Hinton,* 838 So.2d 306, 308 (Miss.App. 2002) (reversing chancellor's modification of custody where chancellor based its decision in part on the fact that child suffered from hemophilia and was left alone for several hours during the day where there was no medical testimony that this was hazardous to child's health).

For that matter, there was no evidence that Marquavion had been abused or would need counseling other than Marvin's testimony.

The chancellor also found that as far as "home school and community record of the child: there are no issues regarding this factor." CP. 8. However, this factor should have weighed in Theresa's favor inasmuch as even Marvin admitted that Marquavion had done well in school. T. 15.

The Chancellor's erroneous findings of fact require that the custody award to Marvin be reversed and the case remanded for a reevaluation of the *Albright* factors.

Conclusion

Marvin Reed waited until his son Marquavion was twelve years old before seeking custody of him. Under these circumstances, the Chancellor should have determined whether there was a change in circumstances justifying modification prior to applying the *Albright* factors. And even if the Chancellor was correct in treating this as an initial custody determination, his failure to take into account Marvin's delay in seeking custody as well as Marvin's failure to seek custody of his other child along with Chancellor's erroneous evaluation of several of the *Albright* factors requires that this case be reversed.

Respectfully submitted,
THERESA N. REED and IRENE DANIELS

By: _____

FELECIA PERKINS, ESQ.
Mississippi Bar Number [redacted]
LAW OFFICE OF FELECIA PERKINS, P.A.
P.O. Box 21
Jackson, Mississippi 39205-0021
Office: (601) 352-5053

CERTIFICATE OF SERVICE

I, Felecia Perkins, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to the following:

Honorable Edward E. Patten, Jr.
Copiah County Circuit Court Judge
P O Drawer 707
Hazlehurst, MS 39083-0707

Renee Harrison Berry
P O Box 729
Hazlehurst, MS 39083-0729

This, the 18th day of February, 2010.

Felecia Perkins