

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

AARON LOVE

APPELLANT

VS.

CAUSE NO. 2010-~~TS~~^{SA}-00450

JENNIFER LOVE

APPELLEE

APPELLANT'S BRIEF

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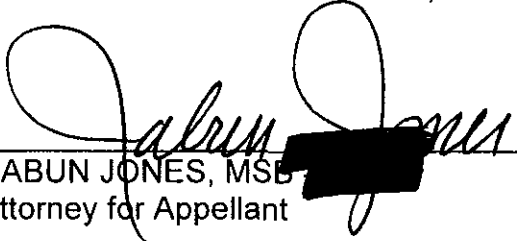
APPELLEE

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 this Court may evaluate possible disqualifications or recusal.

1. The Appellant, Aaron Love, of Leland, Mississippi and his family and relatives;
2. The Appellant's counsel, Honorable Rabun Jones of the law firm of Dyer, Dyer, Jones & Daniels, 149 North Edison Street Greenville, Mississippi;
3. The Appellee, Jennifer Love of Greenville, Mississippi;
and
4. The Appellee's counsel of record, Mack Varner, of Varner, Parker & Sessums, P. O. Box 1237, Vicksburg, Mississippi; and
- 5: The Honorable Marie Wilson, Chancellor, Washington County, Mississippi.

RESPECTFULLY SUBMITTED,



RABUN JONES, MSB
Attorney for Appellant

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STATEMENT OF ISSUES

- I: THE CHANCELLOR ABUSED HER DISCRETION AND MANIFESTLY ERRED ON QUESTIONS ON LAW AND FACT IN HER APPLICATION OF THE ALBRIGHT FACTORS IN THE CASE AT BAR. THE CUSTODY DECREE SHOULD BE REVERSED
- II: IN AWARDING CUSTODY OF TOMMY LOVE TO JENNIFER, THE CHANCELLOR IGNORED THE SUBSTANTIAL WEIGHT OF THE CREDIBLE EVIDENCE, ABUSED HER DISCRETION AND COMMITTED MANIFEST ERROR WARRANTING A REVERSAL OF THE CUSTODY ORDER
- III: THE CHANCELLOR COMMITTED MANIFEST ERROR IN TOTALLY EXCLUDING DEFENDANT'S EXHIBIT 7 FOR IDENTIFICATION AND FORBIDDING ANY OFFER OF PROOF THEREON DUE TO AN ALLEGED DISCOVERY VIOLATION. THE CHANCELLOR FAILED TO CONSIDER SANCTIONS LESS DRASTIC THAN EXCLUSION AND FAILED TO APPLY THE FOUR PART TEST FOR DETERMINING WHETHER SAID EVIDENCE SHOULD HAVE BEEN EXCLUDED.

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APPELLANT BRIEF

STATEMENT OF THE CASE

A:NATURE OF THE CASE

A child custody ruling by the Chancery Court of Washington County has prompted this appeal. Following the parties agreement to a divorce on the grounds of irreconcilable differences, the parties consented to allow the Chancellor to decide the following issue: "The adequate and sufficient provisions for the custody, support and maintenance and visitation of the minor child of the marriage." (CP, 57; T.v.1, p 3). Appellant, Aaron Love, contends on this appeal, among other things, that the Chancellor's abused her discretion in granting custody to Jennifer Lynn Love. The Chancellor's ruling was not only manifestly wrong and against the great weight of the evidence and the best interest of the minor child, Tommy Love, but also the result of the improper application of the *Albright* factors involved in such determination. The ultimate result of the Chancellor's ruling was to ignore substantial evidence from four different witnesses that Mrs. Love had a drinking and drug problem and had placed her child's safety and health at risk. Instead the Chancellor accepted the unsupported, and uncorroborated testimony of Mrs. Love to the contrary.

B: THE COURSE OF THE PROCEEDINGS:

A hearing on the above issues was conducted on August 25, 2009. At the inception of the hearing, the Appellee, Mrs. Love, who both admitted that she was guilty of adultery with another man and pregnant with his child (T. v. 1, p. 5-6, 31, 70-71), filed a Motion in *Limine* in which she sought to exclude for evidence certain photographs and testimonial evidence which she claimed was gathered through an illegal entry into and search of her home contrary to the Fourth Amendment to the U. S. Constitution. (CP 55-56; T. v.1, 116). While the Appellee through counsel admitted that these photographs were taken in her home (T.v.1, p. 4), she further contended that much of what was shown in the photographs- drug paraphernalia, marijuana and a gun - was staged and apparently placed there by the Appellant, Mr. Love (T. v.1, p.4). These photographs are marked in the record as Ex P-1 (RE 39-41). Although as noted below, these photographs and this testimony was at a later hearing admitted into evidence; at trial, however, the court excluded the photographs as well as any testimony as to what Mr. Love or his private investigator had seen in Mrs. Love's residence. (T. v.1, p. 118 - 122).

On September 29, 2009 the court issued its written opinion awarding custody of Tommy Love to Mrs. Love. (CP. 60-74; RE 6-20). In making this ruling, the Chancellor rejected the overwhelming, interlocking testimony of four witnesses which detailed, among other things, that Mrs. Love had a drug and serious drinking problem and that on occasion she, while intoxicated, had been observed driving her automobile with Tommy inside and on other occasions had been seen smoking cigarettes in the presence of the child which significantly contributed to repeated respiratory and ear

infections suffered by Tommy. Instead, the Chancellor accepted the sole, self-serving testimony of Mrs. Love that she did not use illicit drugs, did not have a drinking problem and had not smoked around her child. Thereafter, on October 7, 2009, Mr. Love filed his Motion for Reconsideration and Amendment of Judgment or, Alternatively, for a New Trial. (CP. 75-82; RE 21-28). This motion raised the following issues:

-1-

That the Judgment entered by the Court is against the overwhelming weight of the credible evidence.

-2-

That the Judgment entered by the Court is against the evidence and the law.

-3-

That the Judgment entered herein by the Court misapplied the *Albright* factors and erroneously awarded child custody to Jennifer Lynn Love. (CP-75)

The aforesaid motion also took issue with the court's ruling on the exclusion of the aforesaid photographs obtained by Mr. Love and his private investigator, Mr. Dismuke, from Mrs. Love's home as well as their testimony of their observations in Mrs. Love's home. (CP. 75; RE 21). It was on this excluded evidence only that the court permitted additional testimony in its order dated October 15, 2009. (CP. 83; RE 29). The same order overruled all other grounds asserted for modification of the Chancellor's order as well as all grounds for a new trial. (CP. 83; RE 29).

On February 19, 2010, a second hearing was held on the limited issue of the admissibility of the aforesaid photographs and testimony of Mr. Love and Mr. Dismuke as to their observations in Mrs. Love's residence. During this hearing the court overruled its prior exclusion of these photographs and testimony (T. v. 2, p. 162) but the court refused to alter her prior custody determination although she did shed further light

on the rationale behind her findings on the *Albright* factors. (T.v.2, p. 181-183).

Also during this post-trial hearing, an effort was made to impeach Mrs. Love's testimony through use of several photographs (Ex D-7 for identification; RE 43-44) taken by Mrs. Love on her camera but which Aaron had printed. (T. v. 2, p176-178). These photographs were excluded because they had not been produced during discovery - which discovery was conducted by Mrs. Love long after the 90 day discovery period allowed by Rule 1.10 of the Uniform Chancery Court Rules had expired. (See docket entries, at CP 4-5; RE 1-2 as well as CP p. 52; RE 38). When Mr. Love requested permission to make a proffer of what was depicted in the photographs the Chancellor denied his request and simply excluded the photographs (T. v. 2 p. 178; RE 32). The Court, however, in her ruling on the post-trial motion provided her own description of these photographs with the observations that the photographs appeared to be taken in 2009 with Mrs. Love's brother and boyfriend pictured on her couch and one photograph apparently depicting Mrs. Love's brother smoking a marijuana cigarette and another showing him apparently high. (T. v. 2, p. 183; RE 36).

Since the Chancellor refused to alter her initial custody determination, Mr. Love filed his Notice of Appeal on March 15, 2010.

STATEMENT OF THE FACTS:

These parties were married on January 7, 2006 (CP 7-10, 28-33; T.v.1, p. 12) and separated in late October or early November 2007 (CP 7-11, 28-33; T.v.1, p. 12, 21,78). One child, Tommy, was born to the parties on July 30, 2006 (CP 7-11, 28-33; T.v.1, p. 103).

The parties had continuously resided with each other at various locations in

Leland, Mississippi and Starkville, Mississippi for approximately four years before the marriage. (T.v.1, p. 13-17, 83-84, 107-108). When Tommy was three or four months old, the parties moved in with Aaron's parents in Leland, Mississippi. (T.v.1, p.16-17, 83-84, 108). Aaron's parents, Larry and Pat Love had been married for thirty-two years (T.v.1, p. 15, 83) and had a residence at 105 Redbud in Leland, Mississippi, which residence is depicted in the photographs which comprise exhibit D-3 (T.v.1, p. 102, 111-112).

How long Jennifer, Aaron and Tommy lived with Tommy's parental grandparents was stated to be anywhere from six months to one year but the court determined it was one year. (T. v.1, p. 17, 83, 108; CP 62 at para 15). While there, Tommy developed a close relationship with his grandparents particularly his grandfather, Mr. Love. (T. v. 1, p. 42, 83, 111). Tommy loved going to the airport and sitting in his grandfather's crop dusting airplane. (T. v. 1, p.83). The Loves additionally had numerous relatives in close proximity (T. v. 1, ps 125-126) while Jennifer's only Mississippi relative was her step father with whom she no longer had contact since he had divorced her mother and remarried. (T. v. 1, p. 30, 32). Jennifer's father lived in Ohio (T. v. 1, p. 32-33) and her mother in New Jersey (T. v. 1, p. 33). While no testimony was offered as to how affectionate Tommy was to his mother's side of the family, Jennifer stated she herself was close to her father and step mother. (T. v. 1 p. 34). She talked to them on average one time a week by phone. (T. v. 1 p. 34).

While living with Aaron's parents, Jennifer worked afternoons and nights either as a waitress or bartender. (T. v. 1, ps 13-19). During the parties marriage she had held from ten to fifteen or eighteen to nineteen such jobs. (T. v. 1 ps 78, 106). She had

acquired her GED, had attended one semester of community college, and planned on returning to college where she had been studying anatomy. (T. v. 1, p 14, 44). Several months prior to trial she had begun supplementing her bartending income by doing seamstress work and she specialized in making quilts out of crown royal sacks. (T. v. 1, p. 19-20, 67-68)

Aaron on the other hand had a High School degree and had two and a half years of community college. (T. v. 1, p 103). When the parties moved in with his parents, he was working at Radio Shack where he would open and close the store and his hours fluctuated - he sometime getting off work as late as 9:30 p.m. (T. v. 1, p 16,18,95, 104). He later worked at Aaron's Rents and Sales for approximately a year where he moved up to a management position and then moved to Advanced Auto Parts where he had worked a year at the time of trial and where he got off work between 3:00 and 5:00 p.m. (T. v. 1, p. 95, 105).

During the period of time that Aaron, Jennifer and Tommy lived with Aaron's parents, Aaron's mother took care of Tommy while both of his parents were at work. (T. v. 1, p. 15, 77, 95, 110). Since Aaron primarily worked during the day, Jennifer would care for Tommy up til approximately 4:00 p.m. when she went to work and Aaron would thereafter assume Tommy's care when he got off work. (T. v. 1, p. 17, 18).

During the parties sojourn with Aaron's parents, Jennifer began coming home drunk after work on average two or three times a week. (T. v. 1, p. 84-85, 110). Aaron had been concerned with her drinking and smoking during her pregnancy with Tommy and while she did cut down on her drinking during that time, she did not cut back on smoking. (T. v. 1, p. 106-107). In addition to drinking away from the Love residence,

Jennifer would also come home after work and drink beer in the parties' bedroom. (T. v. 1, 110). Presumably it was the alcohol in her system which made her such a sound sleeper that she would not hear Tommy if he cried out during the night despite an intercom being in the room; and it was Aaron on those occasions who awoke and took care of Tommy. (T. v. 1, p. 84-85, 110). Aaron also became suspicious of Jennifer during the time she resided in his parents domicile because she began returning home hours after she got off work. (T. v. 1, p. 108-109). Because of this he followed her on two occasions to different houses at least one of these was occupied by a man named Anthony Ross. (T. v. 1, p. 108, 109).

In or about November 2007, Jennifer decided to separate from Aaron and she moved to a three bedroom, one bath house located at 257 Wilcox Road in Greenville, Mississippi. (T. v. 1, p. 12, 22, 44-46). Aaron continued to dwell with his parents. (T. v. 1, p. 82, 102). Once she moved out, the parties established a joint custody arrangement in which Aaron had custody of Tommy 4 days a week and Jennifer 3 days a week. (CP 44-46; T. v. 1 p 20, 90). According to the Consent Decree providing Temporary Custody, Aaron had Tommy in his custody from 10:00 a.m. every Thursday until noon on the following Monday of every week. Jennifer had Tommy the remaining days, (CP 45-46; RE 4-5).¹ For six months after the separation the parties considered getting back together (T. v. 1, p. 81) and during this period of time Jennifer continued to use Aaron's mother as a babysitter while Jennifer was at work. (T. v. 1, p. 90). After the six month separation, however, Jennifer abandoned her use of Mrs. Love as a

¹ Jennifer, despite this decree, claimed that the parties had divided the custody equally each getting three and a half days a week. (T. v. 1, p 20, 67).

babysitter and had used four different babysitters at various times since the separation. (T. v. 1, p 36-37, 77).

Several revealing glimpses into Jennifer's lifestyle are presented in the record. The first of these is through the eyes and testimony of Felicia Jefferies, a 20 year old who along with her boyfriend moved into Jennifer's home in March or April 2008. (T. v. 1, p. 55-57, 64). According to Felicia, Jennifer drank alcohol every night. (T. v. 1, p 58). Felicia observed that Jennifer would wait until Tommy was put to sleep and then she would be intoxicated and this occurred on a daily basis. (T. v. 1, p.59). On one occasion, Jennifer got so inebriated that she fell into her TV speakers. (T. v. 1, p. 59). While Jennifer denied this and described herself as an occasional drinker who had stopped drinking entirely six or seven months prior to trial (T. v. 1 p 29, 71-72, 138) she did admit to being drunk a handful of times soon after Tommy was born. (T. v. 1, p. 93, 139).

Felicia Jefferies also noted during this time that Jennifer frequently would get up in the mornings, place Tommy in his high chair, and then go back to sleep for up to an hour. (T. v. 1, p. 62). Though Jennifer denied this testimony (T. v. 1, p 72), Pat Love who occasionally went to Jennifer's home to pick Tommy up related a similar incident. (T. v. 1, p 89). According to Mrs. Love, on the way to pick Tommy up on one occasion she called Jennifer and got no answer. (T. v. 1, p 89). When she arrived at Jennifer's home, Mrs. Love knocked on the door two times before Jennifer opened it. (T. v. 1, p 89). At that point, according to Mrs. Love, Jennifer told her that she had been asleep on the couch (T. v. 1, p. 89). Upon entering the home, Mrs. Love found Tommy sitting in his high chair. (T. v. 1, 89). The child had thrown raisins all over the floor and had

poured red juice similar to cool aid on his head and enough time had passed for this liquid to dry on him. (T. v. 1, p 89-90). While in response to this testimony Jennifer admitted that she sometimes put Tommy in his high chair for short periods of time to discipline him, she likewise denied that she told Patricia Love she had been asleep - her version of the above incident being that she was watching TV and that she does not clean Tommy up immediately every time he gets something on him. (T. v. 1, p. 35, 74, 139). Jennifer did admit, however, that she had installed a screen door lock on the outside of Tommy's bedroom door so that he would not get up and roam around the house at night while she was sleeping. (T. v. 1 p 76-77). Jennifer claimed she had to do this because the baby monitor she possessed did not work. (T. v. 1, p. 76).

Felicia Jefferies also chronicled Jennifer's relationship with other men during the 4 to 5 month period she lived in Jennifer's home. (T. v. 1 p. 60-61). Jennifer, according to Felicia, would during the week have 2 to 3 different men over to the house and sometimes would sleep with them while Tommy was also asleep in the house. (T. v. 1, p. 60). One of these men, B. J. Raymond, moved in with her for a few weeks while Jennifer tried to make up her mind if she liked him. (T. v. 1, p. 61). Jennifer apparently did not directly contradict this testimony but instead merely stated that her relationship with Felicia Jeffries was bad (T. v. 1, p. 137).

Ms. Jefferies also chronicled Jennifer's smoking activities involving both tobacco and marijuana. (T. v. 1, p. 61). According to Ms. Jefferies, she observed Jennifer smoke marijuana every day while she was living with her during the time period March or April to August 2008 (T. v. 1, p 55-56, 61). Ms. Jefferies discerned that Jennifer kept the marijuana in one of 4 or 5 silver cans that she kept on top of her refrigerator. (T. v.

1. p 63). See also, Ex D-1; RE 39-41 and footnote 3 below. On some of these occasions marijuana was smoked while Tommy was present in the house (T. v. 1 p. 61). Jennifer also, according to Ms. Jefferies, smoked cigarettes around Tommy and permitted others in the home also to smoke around him. (T v. 1. p. 61). As noted below, this contributed to the repeated ear infections suffered by Tommy. (See, exhibit D-2; RE 42; also Final Judgement, CP 62 at para 14; RE 8).

Jennifer's position on the marijuana issue vacillated between that she had smoked it up until she was 18² or had not smoked marijuana since November 2007 the date of her separation from Aaron. (T. v. 1, p. 38, 74-75). As for cigarettes, she apparently admitted having smoked around Tommy in the past (T. v. 1, p141) despite knowing the danger of second hand smoke. (T. v. 1, p 70).

Felicia Jefferies' observations of Jennifer did not stop once she moved out of Jennifer's home in August 2008. (T. v. 1, p. 56). In September 2008, Felicia was at work at a convenience store and Jennifer drove up in her automobile with Tommy inside. (T. v. 1, p 59-60). Jennifer proceeded to a drive through window and asked Felicia for a six pack of beer (T. v. 1, p 59). An altercation between these two erupted when Jennifer told Felicia that she owed her \$40.00 on a light bill. (T. v. 1, p. 59-60). Jennifer exited the vehicle and hit Felicia twice in the face. (T. v. 1, p. 60). According to Felicia, Jennifer was so drunk that she did not know what she was doing (T. v. 1, p. 60). Felicia admonished Jennifer to go back home which according to Felicia was approximately one and a half mile away from the work site. (T. v. 1 p. 60). Felicia had

² Jennifer turned 18 on August 10, 2002 according to her 8.05 form, Ex P-2, which listed her birthday as August 10, 1984.

previously, while she was living with Jennifer, observed Jennifer on other occasions driving her automobile while intoxicated with Tommy inside the vehicle. (T. v. 1, p. 59).

Jennifer's recollection of the above incident was that she did in fact go to Felicia's place of employment but for the purpose of collecting \$300.00 that she asserted Felicia owed for unpaid rent and utility bills. (T. v. 1, p 137-138). Jennifer claimed Felicia took the first swing and then she swung also. (T. v. 1, p. 138). She denied Felicia's testimony about being drunk on that or any other occasions. (T. v.1, p 138).

This observation of Jennifer driving Tommy around while she was intoxicated, however, was also echoed and bolstered by Aaron's mother, Pat Love, who witnessed a similar incident in February 2008 when Jennifer came to her home to pick Tommy while visibly intoxicated. (T. v. 1, p 86-87). Jennifer could not walk a straight line and reeked of beer. (T. v. 1, p 87). Although Patricia Love allowed Jennifer to take Tommy on that occasion since she did not know what to do (T. v. 1, p. 87) she admitted it was the most stupid thing she had ever done. (T. v. 1, p 100).

After the separation of these parties Tommy who was not a sick child at the time of separation began developing ear infections (T. v. 1 p. 23). He had as many as 7 or 8 ear infections in a one and a half year period following the separation and was placed under the care of Dr. Barbara Ricks. (T. v. 1, p 23, 90). Although Jennifer claimed she arranged several doctor's appointments, she acknowledged that Aaron and his mother were usually the ones who took him to the doctor. (T. v. 1, p 24, 91). Jennifer failed to go to at least a dozen doctor's appointments for Tommy because, according to her, she was not told about the appointments. (T. v. 1, p 24).

After finding it necessary to place tubes in Tommy's ears, Dr. Ricks on October 27, 2008 wrote a letter to Tommy's family members in which she stated that second hand smoke was a known contributor to the ear problem that Tommy was having. (Ex. D-2; RE 42; T. v. 1, p. 24, 69, 122-123). Aaron, who had never smoked cigarettes (T. v. 1, p. 28, 104) professed to have given this letter to Jennifer the following Monday (T. v. 1, p. 123) but Jennifer contended that she had not gotten it until February or March of 2009. (T. v. 1, p. 69). Her testimony on smoking cigarettes then moved into a pattern in which inconsistency was the rule not the exception. On the one hand, she opined that she had ceased smoking around Tommy after she received Dr. Ricks' letter (T. v. 1, p. 28,70) and on the other hand she stopped smoking around Tommy a month before she got the letter. (T. v. 1, p 69). At another point she recounted she stopped smoking in her home after she received the letter (T. v. 1, p 28) and at another she averred she had stopped smoking at home in October 2008 when Dr. Ricks' letter was written. (T. v. 1, p 140).

Aaron, however, recalled that he had observed Jennifer continue smoking in Tommy's presence two times after he gave her Dr. Rick's letter. (T. v. 1, p 123-124). Both Aaron and his mother, Patricia Love detailed the second of these two post - letter, smoking incidents in which Jennifer was in her car with Tommy and smoking following a visit to Dr. Rick's office - this event occurring only three weeks prior to trial. (T. v. 1, p. 91-92, 123-124). Once again Tommy had an ear infection at the time, the worst he had ever had according to Patricia Love. (T. v. 1, p. 91). The child had puss running from his ears. (T. v. 1, p. 91).

Right after Tommy had left the doctor's office, Jennifer with Tommy in her car

pulled up beside Aaron and his mother with her windows rolled up while smoking a cigarette. (T. v. 1, p. 91, 124). Jennifer of course denied this incident (T. v. 1, p 141). While not admitting to the "smoking" method of ignoring her son's medical needs, Jennifer did agree that she had not dispensed his antibiotics correctly on a couple of occasions. (T. v. 1, p. 70).

On October 20, 2008, Aaron hired a private detective, Robert Dismuke who had been a detective since 1999 and who had formerly been over a ten to twelve year period a police officer, deputy sheriff and certified law enforcement instructor at the law enforcement training academy. (T. v. 1, p 144-145). Aaron did not know Mr. Dismuke prior to hiring him. (T. v. 1, p 115). According to Mr. Dismuke on two occasions he entered Jennifer's home with Aaron Love. (T. v. 1, p. 145). The first of these occasions was the early afternoon of December 6, 2008. (T. v. 1, p. 146-147). Aaron Love on that occasion used an old looking key to open the front door. (T. v. 1, p. 146).

Mr. Dismuke had a camera with him and took approximately twelve photographs on December 6 which as noted above were initially excluded from evidence but later some were admitted as photographs B, H and G in exhibit P-1 (sic)³ (RE 39-41)(T. v.1, p 147-148; T. v.2 p. 152). Those photographs depicted the following:

Photograph B - depicted several bottles of hard liquor on top of the refrigerator as well as several silver canisters (T. v. 1, p. 60-61, 148). Jennifer

³ There are two sets of photographs marked as exhibit P-1. The photographs offered by Mr. Love, the defendant, were however initially marked as D-1 for identification (T, v.1, p. 118) and later when admitted into evidence were marked as exhibit P-1 by mistake. This error in the record was included in Defendant/Appellant's statement of Proposed Corrections to the Record as item C.

denied these were her liquor bottles (T. v. 2, p. 173) but admitted the canisters depicted could be hers. (T. v. 2, p. 179-180).

Photograph G depicted a silver canister which Aaron had removed from Jennifer's freezer while looking for ice which contained numerous partially smoked marijuana cigarettes. (T. v. 1, p. 117; T. v. 2, p. 175). Jennifer denied these items were in her home in December 2008. (T. v. 2, p. 175).

Photograph H showed several marijuana smoking devices in Jennifer's bedroom (T. v. 1, p. 116-117, 148). Jennifer likewise denied any knowledge of these items. According to Mr. Dismuke who had been trained to recognize marijuana, there was no question in his mind that the substance reflected in some of his photographs was marijuana (T. v. 2, p. 153).

During the ten minute period Aaron and Mr. Dismuke were in Jennifer's home on December 6th, Mr. Dismuke recalled that Aaron telephoned Jennifer using a speaker phone device and inquired of her, "Jennifer why do I need to come by here everyday and feed your dog? Why can't I just take him home with me and feed it? What did you do with the dog food?" (T. v. 1, p. 150; T. v. 2 p. 151). Dismuke recalled that Jennifer told Aaron to take the dog with him. (T. v. 2, p. 151). This testimony was disputed by Jennifer who claimed she did not give Aaron a key to her home or permission to go into her home and in fact that she had a neighbor who was feeding her dog. (T.v.1, p. 78, 80, 170-171). She did admit she may have had a telephone call from Aaron who was checking on Tommy but no conversation about her dog. (T. v. 2, p. 170).

The second occasion Mr. Dismuke went into Jennifer's home, also with Aaron was December 26, 2008. (T. v. 1, p. 149). On this occasion he took approximately

twenty-four to thirty pictures (T. v. 1, p. 148) some of which are included as photographs A, C, D, E, F and I in the above exhibit. (RE 39-41)(T. v. 2, p. 152). Photographs C and I depicted a loaded handgun that Aaron had found under Jennifer's mattress on his second excursion into her home. (T. v. 1, p 118). Aaron was prompted to look under her mattress because Tommy had recently, while at Aaron's parent's home, begun pointing at the mattress and saying "Mommy's pow pow" - his name for a gun. (T. v. 1, p. 118).

Jennifer's testimony about the gun is to contradictory. She initially denied ever having a gun or knowing how to use one. (T. v. 2, p. 173). Later under cross examination, however, she admitted that there was a gun under her bed that was solid black in color. (T.v. 2, p. 175).

Finally, Mr. Dismuke offered additional testimony in conflict with Jennifer's contention that she had not smoked marijuana since November 2007, the approximate date of her separation from Aaron. (T. v.1, p 38, 74-75; T v 2, p 153-155). On April 2, 2009 he served a subpoena on James Trillo, Jennifer's boyfriend, at a house nearby Jennifer's. (T. v. 2, p. 156). When he knocked on the door, a man named Eric opened the door and, after inquiry by Mr. Dismuke, Eric admitted that Jennifer and Mr. Trillo were in fact present. (T. v. 2, p.156). Upon being invited inside, Mr. Dismuke noted a strong odor of marijuana and upon observing Jennifer he concluded that she looked as though she had been smoking marijuana. (T. v. 2, p. 156-157).

According to Mr. Dismuke on cross-examination, he reported his observations of Jennifer and her home to the local drug task force. (T. v. 2, p. 159-160). He also provided information to the task force over several months of his observations that

approximately every two weeks Jennifer would go out of town and when she returned vehicles came to her home at all hours of the night for two to three days. (T. v. 2, p 160-161). Mr. Dismuke did not, however, fill out a criminal affidavit on the basis of his observations. (T. v. 2, p 161). The record is devoid of any proof one way or the other that the task force took any action on the basis of Mr. Dismuke's observations. Mr. Dismuke, though, noted his opinion that his reports to the task force apparently did no good. (T. v. 2, p 159).

SUMMARY OF THE ARGUMENT

In applying the *Albright* factors to determine who should get custody of Tommy Love, the Chancellor below abused her discretion and committed manifest error. First, the Chancellor determined that the age, health and sex of the child factor favored neither party. In arriving at this conclusion, however, the Chancellor erred by limiting her perusal of the evidence to relative recent facts while ignoring substantial evidence of Jennifer's past acts which had a significant adverse impact on Tommy's health.

The record reflects, and the court found, that Tommy suffered from a serious of eight ear infections which required that tubes be placed in his ears. The Chancellor also found that second hand smoke worsened this problem. Jennifer Love, not Aaron Love, smoked cigarettes around Tommy and also permitted others to do so.

Yet, despite this substantial proof, the court in deciding to award the age, health and sex factor to neither parent ignored that lengthily track record of smoking around the child, and instead focused on Jennifer's self-serving declaration that she had quit smoking for six months.

The Chancellor misapplied the law in determining this factor. Relying on a

defense to certain grounds for divorce, the Chancellor explained that she did not consider Jennifer's long history of smoking around Tommy because Aaron knew, when he married her, that she was a smoker and thus he should not benefit from that proof. Apart from the fact that the Chancellor, in making this determination, lost sight of the fact that child custody is not awarded as a favor to either parent but instead for the best interest of the child, this ruling by the court is further manifest error for two additional reasons.

First, there is no proof in the record as to when Aaron learned Jennifer smoked cigarettes or when Jennifer began smoking cigarettes. Secondly, the Mississippi Supreme Court has held that in applying *Albright* factors the Chancellor should peruse both current as well as past occurrences in making its custody determination.

The Chancellor manifestly erred in applying other *Albright* factors including: the continuity of care factor, the best parenting skills, and the emotional ties of parent and child. In short, the Chancellor's method of applying the *Albright* factors in this case constituted manifest error and abuse of discretion.

The Chancellor also manifestly erred in her findings of fact primarily on the best parenting skills *Albright* factor. Jennifer testified that although she once did, she no longer smoked cigarettes around her child, did not use marijuana, did not have a drinking problem and did not drive Tommy around while intoxicated. The Chancellor was also presented with substantial testimony from four other witnesses (Aaron Love; his mother, Patricia; Felecia Jeffries, a former roommate of Jennifer's; and Robert Dismuke) which directly contradicted Jennifer's positions on the above matters. On many facets the testimony of these four witnesses significantly corroborated testimony

from the other three.

The Chancellor, however, looked at each of the four witnesses' testimony in seclusion and determined reasons why each individually should not be believed. She failed to consider the many points on which these witnesses agreed and the corroborative nature of their testimony. Accordingly, the Chancellor abused her discretion and was manifestly erroneous in her findings of fact on this issue.

Finally, the Chancellor abused her discretion and committed manifest error in totally excluding for an alleged discovery violation defendant's exhibit 7 for identification and forbidding any offer of proof thereon. The photographs excluded, as noted by the court, were apparently taken by Jennifer in 2009 while her younger brother was visiting her and apparently showed her brother smoking a marijuana cigarette and high while Tommy was present in the home. This testimony was offered to impeach Jennifer's testimony that she had stopped smoking marijuana.

The court's failure to consider this proof was potentially devastating to Mr. Love's case because it would have brought Jennifer's portrait of herself, a house built of card, tumbling down. The Chancellor failed to apply the proper test to determine if this proof should be excluded and thus committed manifest error in excluding this proof as well as failing to consider less drastic alternatives.

For the reasons asserted above, this child custody determination should be reversed.

ARGUMENT

I: THE CHANCELLOR ABUSED HER DISCRETION AND MANIFESTLY ERRED ON QUESTIONS ON LAW AND FACT IN HER APPLICATION OF THE ALBRIGHT FACTORS IN THE CASE AT BAR. THE CUSTODY DECREE SHOULD BE REVERSED.

The polestar consideration in any child custody case in this State is the best interest and welfare of the child. *Sellers v. Sellers*, 638 S. 2nd 481 (Ms 1994); *Albright v. Albright*, 437 S. 2nd 1003, 1005 (Ms 1983). To aid chancellors in determining what custody arrangement is, in fact, in the child's best interest and welfare, the Albright court listed an often repeated series of factors which chancellors are to utilize in making custody determinations:

- (1) Age, health, and sex of the child;
- (2) A determination of the parent that has had continuity of care prior to the separation;
- (3) Which has the best parenting skills and which has the willingness and capacity to provide primary child care;
- (4) The employment of the parent and responsibilities of that employment;
- (5) Physical and mental health and age of the parents;
- (6) Emotional ties of parent and child;
- (7) Moral fitness of parents;
- (8) The home, school and community record of the child;
- (9) The preferences of the child at the age sufficient to express a preference by law;
- (10) Stability of home environment and employment of each parent; and
- (11) Other factors relevant to the parent-child relationship.

Id. 437 S. 2nd at page 1005. See also, *Hollon v. Hollon*, 784 S. 2nd 943, 947 (Ms 2001).

In her written ruling, the Chancellor awarded Jennifer three *Albright* factors which were: (3) the best parenting skills (slightly in Jennifer's favor), (4) the employment of the parent and responsibilities of that employment, and (6) the emotional ties between the parent and child. (CP 66-71; RE 12-17) The following factors were given to neither

party: (1) health and sex of the child (2) the continuity of care prior to the separation, (5) the physical and mental health of the parents, and (9) the preference of the child was held not to be applicable due to Tommy's young age.(CP, 66, 71-72; RE 17-18) The remaining factors were given to Aaron, including: (7) moral fitness of the parents, (8) the home, school and community record of the child, (10) the stability of the home environment and employment of each parent. (CP, p 71-72; RE 17-18) Thus Jennifer was given three factors with one of those, the best parenting skills, being a close call (C P. 70; RE 16) and Aaron likewise was given three.

Nevertheless, as noted by D. Bell, Mississippi Family Law (1st ed, 2005) at section 5.03:

The Albright factors guide chancellors in reviewing evidence relevant to custody. They are not, as the Supreme Court has noted, 'the equivalent of a mathematical formula.' Although chancellors are instructed to weigh parents' relative merits under each factor, a parent who 'wins' on more factors is not necessarily entitled to custody. In some cases, one or two factors may control an award. Furthermore, a chancellor's ultimate decision is guided by additional considerations - the credibility of witnesses, the weight of their testimony, and the weighing of evidence capable of more than one interpretation.

See also, *Lee v. Lee*, 798 S. 2nd 1284, 1288 (Ms 2001); *Divers v. Divers*, 856 S. 2nd 370, 376 (Ms App 2003).

As noted by the Mississippi Supreme Court in *Hollon v. Hollon*, supra, 784 S. 2nd at page 946, "where the chancellor improperly considers and applies the *Albright* factors an appellate court is obliged to find the Chancellor in error." An appellate court, considering a custody determination, should "review the *Albright* factors as applied to determine if the Chancellor abused his discretion in applying such factors." *Jerome v. Stroud*, 689 S. 2nd 755, 757 (Ms 1997); see also, *Lawrence v. Lawrence*, 956 S 2nd,

251, 258 (Ms app 2007). Such a perusal in the case at bar does, in fact, reflect that the Chancellor below did abuse her discretion and misapplied *Albright*.

AGE, HEALTH AND SEX OF CHILD

The first factor considered by the Chancellor below, the health and sex of the child, clearly reveals manifest error and an abuse of discretion. On that factor, the final judgment (CP 60-74) rendered by the Chancellor made the following findings:

Age, health and sex of the child - Tommy is a 3 year old male child. He suffers from allergies, ear infections, and throat problems. Second hand smoke contributes to these problems. Aaron and Patricia (Aaron's mother) testified that Jennifer has smoked cigarettes in the presence of Tommy and did so after she received the October 27, 2008, letter Aaron requested and received from Tommy's doctor advising family members to eliminate second hand smoke around Tommy as it contributes to his health problems. However, Jennifer has quit smoking cigarettes altogether⁴ and Aaron does not smoke cigarettes. This factor favors neither parent. *Owens v. Owens*, 950 S. 2nd 202 (Ms app 2006). (CP 66; RE 12)(parenthetical information added).

In response to Mr. Love's post-trial motion, the Chancellor further elucidated her reasoning in not giving this factor to either party. The Chancellor stated:

We're here on a Motion for Reconsideration filed by Aaron Love, who is the defendant in this case, asking the court to reconsider its weighing of the *Allbright* (sic) factors. He's asked that the court reconsider the weighing of the *Allbright* factors in this case. Specifically, he asked with regard to the age, sex and health where the court found that factors favored neither party and he argued that the plaintiff's smoking during pregnancy and not stopping until after she received a letter from the doctor should make that factor go towards him. However, the court believes that he knew at the time that he got with the plaintiff that she was a smoker. He had a baby with her knowing that she was a smoker and the court does not believe that he should, therefore, benefit from that when he made a choice to be with someone who smokes. The court

⁴ While an attempt to quit smoking is laudable, one must remember that cigarette smoking is a highly addictive passtime. Many people quit smoking, but the usual problem is staying abstinent.

again finds that that factor should favor neither. (T. v. 2, p 181: RE 34)(emphasis added).

The Chancellor's later reasoning on this factor is apparently based on a defense to certain grounds for divorce which is aptly discussed Hand, Divorce, Alimony and Child Custody (3rd Ed, 1992). There in section 5-13 Professor Hand states:

If at the time of marriage the husband-to-be knows that his perspective wife is impotent or a habitual drunkard or a drug addict or has other problems that would give rise to a divorce following the marriage, he will be denied relief in the form of a divorce on those grounds. His ante-nuptial knowledge stands as a bar to a divorce based upon the fact that he understood the bargain at the point of entry.

See generally, *Kincaid v. Kincaid*, 435 So. 2nd 108 (Ms 1949); *Burdine v. Burdine*, 112 So. 2nd 522 (Ms 1959).

The application of this divorce defense to this child custody determination raises three significant problems. First, this is a child custody issue in which the best interests and welfare of the child are the issues to be determined. The parties here have agreed to a divorce and no issue as to whether or not a divorce should be granted is present. Clearly, evidence bearing on the child's health should not be barred from consideration in an *Albright* determination because of one parent's alleged pre-marital knowledge of the other spouse's behavior which might later impact a child's health. Consequently, in applying the above principal to the initial *Albright* factor, the Chancellor clearly misapplied the law and abused her discretion.

The second significant problem with the Chancellor's ruling on this *Albright* factor is there is absolutely no proof in the record as to when Jennifer began smoking cigarettes - whether before or after the marriage. Thus, there is no factual predicate upon which the Chancellor could have determined that Jennifer was a smoker prior to

her marriage to Aaron or that Aaron knew that she was a smoker prior to the marriage.

The third significant problem with the Chancellor's handling of this *Albright* factor, was that she apparently considered the facts solely from the standpoint of conditions as they existed at the time of, or shortly prior to, the trial, and not from the standpoint of what was occurring to Tommy during the lengthy period while his mother was smoking around him. Since the Chancellor focused only on current conditions, she failed to consider that although Jennifer apparently knew second hand smoke was dangerous before she ever got Dr. Rick's letter, she continued to smoke around Tommy and allowed others to do so also. (T. v. 1, p. 69-70, 140-141). She also continued to smoke around him even after Aaron requested several times that she stop. (T. v. 1, p. 107). She continued to smoke despite the fact that she knew second hand smoke was bad for her son (T. v. 1, p 70) and the Court held in her Final Judgment that Tommy's condition was "worsened by second hand smoke." (CP 62, para 14; RE 8).

That this method of determining *Albright* factors from current conditions only is improper as disclosed in the case of *Jerome v. Stroud*, 689 So. 2nd 755, 757 (Ms 1997). There the Supreme Court found manifest error when a Chancellor, misinterpreting a prior Supreme Court mandate, failed to consider past events in deciding *Albright* factors but instead relied only on present circumstances. Addressing this point, the Supreme Court stated: "the prior opinion of this Court was not meant as a directive to look at the *Albright* factors in a vacuum of the present day and time ignoring the important past of these parties and their relationships to the children." *Id.*

Perhaps due to the Chancellor's focus on current and not past events, the Chancellor also failed to consider Jennifer's admission that she had, on at least two

occasions, failed to give Tommy his medications as prescribed. (T. v. 1, p 70). Clearly, the Chancellor abused her discretion and did not properly consider all the available, credible evidence which should have resulted in giving this factor to Aaron.

CONTINUITY OF CARE

Though the *Albright* decision frames this factor in terms of continuity of care "prior to the separation", the courts have broadened this factor to include continuity of care following, or during the separation. See, *Caswell v. Caswell*, 763 So. 2nd , 890, 893 (Ms app 2000); *Watts v. Watts*, 854 So. 2nd 11, 13 (Ms app 2003). See also, D. Bell, Mississippi Family Law (1st ed. 2004) section 5.03 [3] at page 105. On this factor the Chancellor's finding were as follows:

Continuity of Care - Aaron argues that Tommy has spent more time with him than Jennifer. When left Aaron in October of 2007, she took Tommy with her. However, in the December 2008 agreed Visitation Order, the parties agreed that during their separation, Aaron had Tommy as much as Jennifer. In December of 2008, the Agreed Visitation Order was entered giving Aaron about as much time with Tommy as Jennifer. This factor therefore favors neither parent. (CP, 66: RE 12)

This written finding was also later supplemented by the Chancellor's ruling on Mr. Love's Post-Trial Motion as follows: "He argues that the continuity of care should have gone to him, that essentially he had the child more than she did. However, its clear from the, I think the Temporary Order, that it was intended that they share the child equally and it may be that he had the child more. I don't know. I think the difference is minor and, again, I think this factor should go to neither party." (T. v. 2, p 181; RE 34).

Contrary to the Chancellor's conclusion that the Agreed Temporary Decree (CP 45-46) gave Aaron "about as much time with Tommy as Jennifer," the Temporary

Decree clearly states that since their separation the parties had been dividing custody of Tommy with Aaron "having the child in his custody from 10:00 a.m. every Thursday until noon on Monday of every week." (CP 45; RE 4) Thus out of every week, according to the party's Agreed Order, Aaron had custody of Tommy for 4 days and 2 hours while Jennifer had him for 2 days and 22 hours.⁵ Aaron, therefore, clearly had Tommy in his custody a majority of the time after the separation.

The Chancellor also failed to consider in looking at this factor that while Aaron was at work, his mother, Patricia Love, was always Tommy's babysitter. (T. v. 1, p. 72, 90, 95). Tommy had lived in Patricia Love's home for a year and loved both of this grandparents. (T. v. 1, p 111). During that year, if Tommy cried out during the night, it was always Aaron who got up and tended to him because Jennifer remained asleep. (T. v. 1, p. 84, 110). On the other hand, since the separation, Jennifer had used four different babysitters for Tommy. (T. v. 1, p 77).

Continuity of care clearly was in Aaron's favor and the Chancellor's decision as to this factor was manifest error.

BEST PARENTING SKILLS

Here the Chancellor recounted much of the proof in this case concerning Jennifer's inability to wake up when Tommy did, Jennifer's drinking habits and use of marijuana, her putting Tommy in his highchair for up to an hour while she slept, as well as her smoking cigarettes around Tommy. This proof was presented through the sometimes interlocking testimony of four different witnesses. The Chancellor, primarily

⁵ Jennifer's testimony on the time Tommy spent with his parents reflects that Aaron had Tommy four days and she had him three days. (T. v.1 p. 20)

on the basis of Jennifer's testimony alone, made a credibility decision and rejected much, if not all, of this adverse testimony against Jennifer.

Mr. Love asserts in proposition II of this brief that the Chancellor's Finding of Fact on this issue were manifestly erroneous. Accordingly, for the reasons set forth in that portion of his brief, the Chancellor's decision on this factor constituted manifest error.

But one observation about the Chancellor's ruling on this factor should be examined before moving to the next factor. The court (in subparagraph I) of this portion of her ruling (CP 69; RE 15) provides what appears to be the gravamen of her finding that Jennifer does not have a drinking problem. The evidentiary basis for this finding is that neither Aaron nor his family took any action to get Jennifer help for her drinking problem. The court uses this fact to conclude that she must not have had a serious drinking problem.

What the Chancellor's rationale fails to consider is what Aaron and his mother knew, or did not know, about Jennifer's drinking at various times. Obviously, the best opportunity they had for witnessing Jennifer's drinking was during the year she lived with them prior to the separation. During that time, Patricia Love observed that Jennifer would come home intoxicated sometime two to three times a week or sometimes less. (T. v. 1, p. 84-85). During that same time, Aaron claimed Jennifer came home intoxicated several times and would drink beer at his parents home. (T. v. 1, p. 110). The amount that she drank at home was not disclosed.

Then after the separation, in February 2008, Patricia Love was home when Jennifer arrived drunk to pick up Tommy. Being so flustered she did not know what to

do, Patricia allowed Jennifer to take Tommy but decided that if a similar occurrence ever happened again, she would act differently. (T. v. 1, p 86-87, 100). No similar occurrence, as far as Pat Love knows, ever occurred again. (T. v. 1, p. 87).

Neither Patricia Love nor Aaron ever called Jennifer an alcoholic. In fact, the testimony of her apparently alcoholic, daily drinking came from Felecia Jefferies, Jennifer's roommate for five months after the separation. (T. v. 1 p. 58).

The records does not reflect when Aaron or his mother learned what Felecia Jefferies' testimony would be. Accordingly, where is the substantial evidence to back up the Chancellor's determination that Aaron or his family should have come to Jennifer's aid? No where in the record was either Aaron or his mother ever questioned about whether they did inquire about some help for Jennifer or why they did not procure her some assistance. Thus this finding of the Chancellor is not based on substantial evidence and thus should be reversed. Lawrence v. Lawrence, 956 So. 2nd 251, 255 (Ms app 2007).

This finding by the Chancellor, according was an abuse of discretion made on the basis of intuition rather than evidence.

EMOTIONAL TIES OF PARENT AND CHILD

The Chancellor found in her ruling on this point as follows:

Emotional ties of parent and child - both parents love Tommy very much. There was no evidence produced to indicated that Tommy loves either of his parents more than the other. Jennifer breast fed Tommy for three months. When Jennifer left Aaron, she took Tommy without objection from Aaron. Jennifer testified about how devastated she would be without Tommy. She further testified about how interwoven their lives and schedules have become. This factor favors the mother. (CP 72; RE 18).

The Chancellor after noting that each parent loves Tommy equally and vice

versa, states "when Jennifer left Aaron, she took Tommy without objection from Aaron." This statement was clearly not only not supported by any substantial evidence but actually contradicted by this record because the Temporary Decree as noted above gave Aaron more time with Tommy than Jennifer had. Jennifer did not oppose this arrangement but instead agreed with it. Further, Jennifer's testimony reflects that for the first six months of the separation the parties were attempting to reconcile. (T. v. 1, p 78). Since they were attempting to reconcile and since Aaron was to have custody a majority of the time, why would Aaron object? If Jennifer took Tommy when she left, Aaron knew he would get Tommy back for a majority of the time every week. The Chancellor's statement about Aaron's failure to object, consequently, is not determinative and carries no weight on this factor because Aaron had no reason to object. Failure to object should have weighed against Jennifer because Aaron got Tommy each week for over one day more than she did.

The Chancellor then inexplicably notes that "Jennifer further testified about how devastated she would be without Tommy." How this observation has any bearing on which parent should get custody is not stated, but the Chancellor by mentioning it obviously concluded it was an important factor. It would be worth noting if Tommy would be devastated by not being in the paramount custody of one of his parents, but why should Jennifer be awarded custody because she would be devastated if she failed to obtain custody? A better question in light of Jennifer's testimony about devastation would be whether or not she had an unhealthy, emotional dependence of some type on her child? Manifestly, on this point the Chancellor abused her discretion, and committed clear error in awarding this factor to Jennifer.

In summary, though the Chancellor gave each parent three of the *Albright* factors, her rationale for doing so was improper. Accordingly, under *Hollon v. Hollon*, *supra*, this custody determination should be reversed.

II: IN AWARDING CUSTODY OF TOMMY LOVE TO JENNIFER, THE CHANCELLOR IGNORED THE SUBSTANTIAL WEIGHT OF THE CREDIBLE EVIDENCE, ABUSED HER DISCRETION AND COMMITTED MANIFEST ERROR WARRANTING A REVERSAL OF THE CUSTODY ORDER

The scope of a review of a Chancellor's decision as to custody has been frequently addressed by this State's appellate courts. The Mississippi Supreme Court "applies the familiar substantial evidence/manifest error rule. (cite omitted) 'This court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied'". *Mosley v. Mosley*, 784 So. 2nd 901, 904 (Ms 2001). Where substantial evidence reflects, however, that the Chancellor was manifestly wrong, reversal will follow. *Mullins v. Ratcliff*, 515 So. 2nd 1183, 1189 (Ms 1987). See also, *Dillon v. Dillon*, 498 So. 2nd 328, 329 (Ms 1986). Stated another way, "absent an abuse of discretion, we will uphold the decision of the Chancellor. This court will not disturb the factual findings of the chancellor unless said factual findings are manifestly wrong or clearly erroneous." *Jerome v. Stroud*, 689 So. 2nd 755, 757 (Ms 1987). The court has defined the word "manifestly" in the phrase "manifestly wrong" as "unmistakable, clear, plain or indisputable." *Mosley v. Mosley*, *supra*. 784 So. 2nd at page 904.

The Chancellor in making her factual findings in this case, was confronted with two very different characterizations of Jennifer. Jennifer herself provided her side of the

picture and four different witnesses supplied the darker portrait. While the Chancellor dealt with each of these four witnesses' testimony individually, she never looked at the fact that their testimony coincided on so many points. And further, despite the interlocking or corroborating nature of much of this proof, the Chancellor did not consider that the rule had been invoked in this case or that there was no showing that these witnesses had colluded to make their testimony consistent.

Most of this conflicting proof was considered by the court in its ruling on the *Albright* factor dealing with best parenting skills.

The proof below reflected that Jennifer, perhaps because of her drinking, was a sound sleeper. The court mentioned Patricia Love's detailing of an incident when Jennifer and she took Tommy to see Jennifer's father in Ohio. (T. v. 1, p. 88, 97-98). On that occasion while Jennifer was asleep in the motel room, Tommy got up and was wandering around the room. But this was not an isolated incident or observation about Jennifer. Aaron (T. v. 1, p. 110) as well as his mother (T. v. 1, p 84-86) testified that she was hard to wake up and would sleep through Tommy's nighttime cries. That this testimony had the ring of truth to it is born out by Jennifer's own admission that she had placed a door latch on the outside of the door to Tommy's room on Wilcox Road so that he would not get up and roam around the house at night while she was asleep. (T. v. 1, p 76). The court in its written ruling found that instillation of this door latch was a serious mistake (CP 70), but it was a mistake easily explained. Jennifer simply needed the door latch because she would not wake up if Tommy woke up and, as most babies do, cried out in the night.

The court mentioned Patricia's observation of Jennifer arriving inebriated in order

to pick Tommy up (T. v. 1, p 86-87, 100) and then separately discussed a similar account by Felecia Jefferies. (T. v. 1, p. 59-60). The court did not, however, seriously consider the weight that evidence from two different witnesses seeing the same activity, though at different times, should be given.

The incident related by Patricia Love of going to Jennifer's home on Wilcox Road and finding Tommy in his high chair with dried, red kool-aid on his head while Jennifer was asleep (T. v. 1, p 89-90, 98) takes on new significance in light of Felecia Jeffries' similar account of a regular occurrence while she lived with Jennifer. According to Felecia, Jennifer regularly would put Tommy in his high chair for up to an hour while she slept. (T. v. 1, p 62). The court did not consider these accounts together, she instead decided she found Felecia's testimony unreliable.

The court likewise apparently failed to heed Aaron's testimony and Mr. Dismuke's photographs showing a black handgun that was found under Jennifer's mattress. (T. v. 1, p 118). Aaron looked for the gun there due to Tommy's pointing to the bed at Aaron's residence and saying "Mommy's pow-pow." (T. v. 1, p 118). The record, however, reflects that Jennifer admitted that a black gun was under her bed. (T. v. 1, p 175). Why the court did not consider this potentially life threatening situation is not explained.

On the issue of marijuana, Jennifer claimed to have stopped smoking it prior to the separation of these parties. The court was presented with testimony to the contrary by Felecia Jeffries who testified that Jennifer smoked marijuana everyday during the five month period Felecia lived with her ending in August 2008. (T. v.1, p 56, 61). Hand in hand with Felecia's testimony were Officer Dismuke's observations that when he

served process on Mr. Trillo, Jennifer's boyfriend, on April 2, 2009, Jennifer was high on marijuana. (T. v. 2, p. 153-155). In turn, the above testimony made it much more likely that the drugs and paraphernalia found by Officer Dismuke and Aaron Love in Jennifer's home belong to Jennifer and were not planted there by Aaron.

In summary, the Chancellor, through a process of compartmentalizing each witnesses testimony, ignored substantial, adverse, corroborating evidence concerning Jennifer's parenting skills. In so doing, and in failing to consider the corroborative nature of said proof, the court abused her discretion and was manifestly wrong.

III: THE CHANCELLOR COMMITTED MANIFEST ERROR IN TOTALLY EXCLUDING DEFENDANT'S EXHIBIT 7 FOR IDENTIFICATION AND FORBIDDING ANY OFFER OF PROOF THEREON DUE TO AN ALLEGED DISCOVERY VIOLATION. THE CHANCELLOR FAILED TO CONSIDER SANCTIONS LESS DRASTIC THAN EXCLUSION AND FAILED TO APPLY THE FOUR PART TEST FOR DETERMINING WHETHER SAID EVIDENCE SHOULD HAVE BEEN EXCLUDED.

During the Post-Trial Hearing on Aaron's Motion for Reconsideration and Amendment of Judgment or Alternatively, For a New Trial (CP 75-82), the court excluded defendant's exhibit 7 for identification from evidence for an alleged discovery violation. Although Jennifer filed this divorce case on January 4, 2008 (CP 4,7; RE 3) she did not submit any discovery until May 1, 2009 (CP 52; RE 38) well beyond a ninety day period allowed for discovery under Rule 1.10 of the Uniform Chancery Court Rules which allows discovery beyond that ninety day period only upon an order of the court. No such order is present in the instant record. In candor, however, the record reveals that the fact that this discovery was conducted after the ninety day deadline was not revealed by counsel to the Chancellor. Nevertheless, that this discovery was tardy was

easily determinable by perusal of the court file.

What transpired during the consideration of this exhibit is found in the record at volume 2, pages 177-178 (RE 31-32). Although the Chancellor did not admit these photographs into evidence she did allude to them in her oral ruling at page 183 of volume 2 (RE 36) of the transcript.

"Courts have applied a four-factor test to determine whether excluding evidence for a transgression in discovery is an appropriate sanction...[A court] should consider: (1) the explanation for the transgression; (2) the importance of the testimony; (3) the need for time to prepare to meet the testimony; and (4) the possibility of a continuance." *Moore v. Delta Regional Medical Center*, 23 So. 3rd 541, 546 (Ms app 2009). Although the Chancellor below did inquire as to the reason why the photographs were not disclosed, she failed to inquire into any of the other three factors.

Clearly these photographs which were apparently taken by Jennifer with her own camera were devastating to her credibility. She, who claimed Aaron continued to smoke marijuana long after she had quit, was shown by the photographs to apparently allow marijuana to be smoked in her home while Tommy was apparently present.

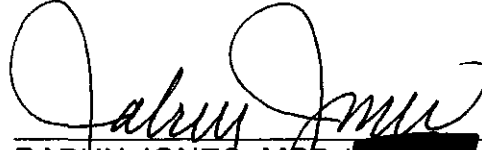
On the amount of time it should have taken Jennifer to prepare to meet this testimony, there is obviously no clear answer. She may have had to dramatically revise her sworn testimony which would have been a lengthy process, there may have been some other explanation which would have taken only a brief time. Finally, no consideration was given to the possibility of a continuance.

Accordingly, in failing to apply the law requiring this four part test to be applied, the Chancellor abused her discretion and committed manifest error.

CONCLUSION

This child custody award must be reversed. Clearly the Chancellor was manifestly in error in her application of the *Albright* factors. She also manifestly error in ignoring and failing to properly consider significant evidence offered by Aaron on Jennifer's parenting skills or lack thereof. Finally, the court error in failing to properly apply the appropriate test in determining whether or not to exclude defendant's exhibit 7 for identification.

RESPECTFULLY SUBMITTED, this the 27th day of October, 2010.



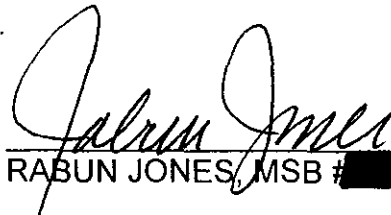
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Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that I, RABUN JONES, the attorney for the Appellant herein, have this day mailed, via regular U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to Honorable Mack Varner, Esq., Post Office Box 1237, Vicksburg, MS 38181-1237 and Honorable Marie Wilson, Chancellor, Post Office box 1762, Greenville, MS 38702-1762.

This, the 27 day of October, 2010.



RABUN JONES, MSB # [REDACTED]