

IN THE SUPREME COURT OF MISSISSIPPI

MATTHEW TYLER MCMULLIN

APPELLANT

V.

CASE NO. 2010-CA-01539

KIMBERLY SCOTT SIMMONS MCMULLIN

APPELLEE

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APPEAL FROM THE RANKIN COUNTY CHANCERY COURT

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BRIEF OF APPELLANT  
Oral Argument Requested

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned hereby certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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### STATUTES

### SUGGESTION REGARDING ORAL ARGUMENT

The Appellant Matthew McMullin believes that Oral Argument would aid the resolution of the appeal before this Court and respectfully requests that the Court grant Appellant's request for Oral Argument. The Chancellor below improperly interpreted the equitable nature of the *Albright Factors* failing to properly apply the extreme potential harm for the minor children the Mother's drug abuse toward the less demanding factors and as such Oral Argument will assist the Court in reviewing the issue.

### STATEMENT OF THE ISSUES

- 1) Whether, Crediting The Court's Finding Of A Material Change In Circumstances Affecting The Best Interest Of the Children Because Of, *Inter Alia*, Their Mother's Drug Addiction, The Court Erred In Not Modifying Custody.
- 2) Whether The Court Improperly Gave Equal Weight to All *Albright* Factors Despite Clear Evidence That The Court Should Have Given Particular Factors Greater Importance.
- 3) Whether The Court Improperly Weighed the *Albright Factors*.

### STATEMENT OF THE CASE

The Parties were married on March 10, 2006 and two boy children were born of the union. (Vol. I. 33). The children were both under four years old at the time of the hearing. On December 12, 2008, the Rankin County Chancery Court entered a Final Judgment of Divorce which established child custody between the parties. (Vol. I. 33). This original order granted the each parent seven days at a time of exclusive joint custody.

On August 13, 2009, the Appellant Matthew McMullin ("Matthew") filed a Petition For Modification Of Child Custody and Other Relief. (Vol. I. 33). Matthew alleged subsequent material changes in circumstances had arisen, creating an adverse effect on the minor children, and that specifically, the

children's mother, Kimberly Scott Simmons McMullin ("Kimberly), was involved in substance abuse and was cohabitating outside the bounds of matrimony, in violation of the terms of the parties' property settlement agreement. (Vol. I. 34). Matthew requested primary physical custody of his young sons based on the danger caused by Kimberly's actions. (Vol. I. 34). For a period of time of roughly five months prior to the hearing of this matter, the Parties agreed to give primary custody to Matthew pending the Court's final decision. (Vol. I. 41).

After two continuances due to Kimberly's having her attorney representation terminated, including one for paying her attorney with a bad check, the Court held a hearing on the record on May 12, 2010. (Vol. I. 41; Vol II. Pg. 52. Ln. 13-14). At this hearing the Court found that a material change in circumstances had occurred and that there was a potential for harm to the minor children based on the *Riley v. Doerner* doctrine and Kimberly's drug abuse. (Vol. III. Pg. 204-207). However, upon review of the *Albright* factors the Court declared them "even" and awarded split joint custody. (Vol. III. Pg. 217 Ln 26).

Matthew filed a Motion to Alter or Amend Trial or in the alternative for a new trial. (Vol. I. 45). On August 25, 2010, the Court heard Matthew's motion and denied it. (Vol. III. Pg. 224-239). Matthew appealed the Court's decision to this Court. (Vol. I. Pg. 56).

## STATEMENT OF THE FACTS

After the Final Divorce Decree Kimberly entered a rehabilitation facility for abuse of prescription drugs. (Vol. II. Tr. Pg. 74-79). Kimberly entered this facility as part of a petition for commitment filed by her mother and step father. Kimberly's mother testified the petition was filed because of Kimberly's stealing a family member's credit card and, "We just felt like it was out of control" in regards to her prescription drug addiction. (Vol. II Tr. Pg. 150 Ln. 22-24).

While Kimberly was in rehabilitation, Matthew retained custody of the minor children based on the parties' agreement and because Kimberly agreed that Matthew was a good father and he created a good environment for the children. (Vol. II Tr. Pg. 48 Ln. 7-10; 67 Ln. 15-19). Kimberly completed fifty-six days in primary residential care with the facility. She accepted the option of attending secondary care. However, she left the program after failing a drug test at the facility after a weekend at home. (Vol II. Tr. Pg. 55-56). Kimberly also testified as to getting a D.U.I. around the time the parties' divorce became final. (Vol. II. Tr. Pg. 80).

Kimberly's grandmother was also present to testify about a restraining order she had placed on Kimberly after Kimberly left the rehab facility because of the failed drug test. (Vol. III. Tr. Pg 157 Ln. 19-23; Exhibit D-1; D-2). Kimberly's



grandmother filed an affidavit with the petition requesting the restraining order that alleged Kimberly stole alcohol from her home or at least used it in her home and stole checks from her. (Id.) The grandmother further testified, "I didn't suspect her. I knew she did." (Vol. III. Tr. Pg. 160 Ln. 28).

Kimberly's grandmother then testified about an incident that occurred the previous Friday at her home, less than a week prior to the hearing. (Vol III. Tr. Pg. 162). Kimberly's grandmother noticed that the cabinet in the kitchen where she kept medication was not closed all the way. Upon investigating the cabinet Kimberly's grandmother discovered a bottle of Xanax was missing. (Vol. III. Tr. Pg. 162 Ln. 24- Pg. 163 Ln 22). The Court found as fact based on the testimony Kimberly took the Xanax from her grandmother. (Vol. III. Tr. Pg. 203 Ln. 4-6).

Kimberly attempted to defend her abuse of the drugs because they were "prescribed" and even testified to additional prescriptions of Pristiq and Xanax. (Vol. II. Pg. 76 Ln. 19-29), despite the fact Xanax was the drug the Court ruled she stole from her grandmother less than a week before trial. (Vol. III. Tr. Pg. 203 Ln. 4-6). Kimberly also testified that she still had prescriptions to Adderall within the ninety days prior to trial. (Vol. II. Tr. Pg. 76 Ln. 14; Pg. 77 Ln. 1).

Kimberly's mother's testified the Adderall was prescribed to help with school

although Kimberly continued to take it long after she finished school. (Vol. II Tr. Pg. 147 Ln. 8-10).

Kimberly further testified that she had not held a job since she entered rehab treatment. (Vol. II. Pg 53 Ln. 14-17). She testified to living in multiple places since leaving rehab. (Vol. II. Pg. Ln. 6). She also testified to cohabitation with another man she was not married to with whom she had a child out of wedlock. (Vol. II. Tr. Pg. 72 Ln. 8-9).

Kimberly further testified that when she had custody, "I'm home 24/7, and when my children are at my house they are with me 24/7". (Vol. II. Tr. Pg. 59 Ln. 10-11). However this testimony was refuted by Kimberly's stepfather who testified that Kimberly left the children with a baby sitter who took the children to her home after Kimberly failed to return home. The baby sitter could not reach Kimberly to pick up her children and had to resort to calling Kimberly's parents to pick up the children from what the step father considered "not a very good" neighborhood. (Vol. III Pg. 170-172). When asked why Kimberly could not pick up the children, he testified, "She was just at – I think at a party." (Vol. III. Tr. Pg. 172 Ln. 8-9).

Upon the close of testimony the Court stated,

"First of all, I am satisfied, Kimberly, you're an addict and until you

you face up to that fact and get yourself completely free of any mood-altering drugs, even those prescribed by a physician, and rid your life of those, your life is going to – it's just going to continue to deteriorate.” (Vol. III. Pg. 202 Ln. 26 - Pg. 203 Ln. 4).

The Court added,

“You may not have gotten to the point of the use of your prescription meds where consequences are taking place, but it's just around the corner, and I think – you've done things that are clearly immoral, illegal, wrong and that only – the only reason that you're not sitting in some jail right now or on probation or on pretrial diversion or some non-adjudication probation is the fact the crimes – and you committed crimes, felonies – is the fact that the people you did it to where your mom and your grandmother.” (Vol III. Pg. 203 Ln. 24 - Pg. 204 Ln. 8). “This is – if this kind of conduct continues, you're going to be in the penitentiary.” (Vol III. Pg. 204 Ln. 22-24).

The Court however determined that the best interest of the children was met by splitting the custody evenly between the parents despite the Court finding no criticisms of Matthew's parenting skills. (Vol. III. Pg. 212. Ln. 4- 6).

### SUMMARY OF THE ARGUMENT

The Trial Court properly found a material change in circumstances and the potential harm for the two minor boys to necessitate an *Albright* determination. However the Court clearly erred by finding the parties were in essentially the same situation as at the time of the divorce as a material change by definition indicates a change from that time. Further the Court had entered into an Agreed Order giving the father primary custody for five months prior to the hearing. Additionally the

potential harm to the minor boys stemming from Kimberly's drug abuse the Court found clearly outweighed any *Albright* factor that favored the mother. The Court erred by viewing the factors as evenly weighted instead of equitably. The Court also erred in its determination of the *Albright Factors* by holding that the Tender Age Doctrine was applicable. This was error because the Mother had not provided the majority of care for the young children, the mother frequently changed her residence, had no employment, and demonstrated overall instability, while the Court equally erred in ruling that the Father did not provide the majority of care prior to the hearing, improperly overlooking the fact the Father had cared for the children, in accordance with the Agreed Order, for the five months preceding the hearing.

## ARGUMENT

### Standard of Review

The Court reviews all questions of law under a de novo standard of review. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 721 (Miss. 2002). In domestic relations cases the scope of review is limited by the substantial evidence/manifest error rule. The Court may reverse a Chancellor's findings of fact only where there is not substantial credible evidence in the record to justify his finding. The scope of review in domestic relations matters is limited under the

familiar rule that the Appellate Court will not disturb a Chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. *Jundoosing v. Jundoosing*, 826 So. 2d. 85, 88 (Miss. 2002.)

**1) Whether, Crediting The Court's Finding Of A Material Change In Circumstances Affecting The Best Interest Of the Children Because Of, *Inter Alia*, Their Mother's Drug Addiction, The Court Erred In Not Modifying Custody.**

The Court ruled that a material change in circumstances had occurred. Further the Court ruled that following the *Riley v. Doerner* doctrine, "the life-style which [Kimberly has] chosen is certainly one of potential harm for these - for these two little boys." (Vol. III. Tr. Pg. 208 Ln. 6-9). *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996). However, the Court also determined that Matthew knew of Kimberly's actions prior to entering into an agreed judgment of divorce (Vol. III. Tr. Pg. 217), despite Matthew's testimony that Kimberly's actions escalated after the divorce saying, "she didn't abuse Adderall at the time of the divorce." (Vol. II. Tr. Pg. 114 Ln. 9-10). After finding the parties equal on the *Albright* factors the Court reverted to the property settlement agreement first entered into in

connection with the Final Divorce Decree and not in accordance with the Agreed Temporary Order granting Matthew primary custody.

However, logically, if there is a change in circumstances then the circumstances are not the same as at the time of the divorce. “A material change in circumstances has been defined as a material change in the overall circumstances in which the child lives, with such materially changed circumstances likely to continue for the foreseeable future.” *Balius v. Gaines*, 908 So. 2d 791, 801 (Miss. Ct. App. 2005).

Clearly a material change requires a change in the circumstances from the custody order under review. However, in this case the Court found a material change but held that Matthew was responsible for knowledge of the circumstances being the same at the hearing as during the snapshot of the time of the Final Decree. Therefore the Court was in error in finding both a change in circumstances yet binding Matthew to the initial child custody agreement because the Father had reason to know the circumstances were the same as when he entered into his property settlement agreement.

Additionally, the Court found that the children were subject to an adverse environment according to the *Riley v. Doerner* doctrine. *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996). If the children are subject to a potential adverse environment

they should not be subjected to half of their life in such an environment. It cannot be in the best interest of the children to be subject to an environment that is potentially adverse to their well being. The lower Court's findings of potential harm for the minor children and material change in circumstances legally undercut granting equal custody to the parent who would be the source of this potential harm.

**2) The Court Improperly Gave Equal Weight to All *Albright* Factors Despite Clear Evidence That The Court Should Have Given Particular Factors Greater Importance.**

Additionally the trial Court erred in its interpretation of the *Albright* Factors. Upon reviewing the Factors the Court determined that the parties were equal and that each had the same number of factors in their favor. However, "Child custody is a matter of equity which requires more than counting the votes in favor of the mother or father. A single factor can weigh so heavily in favor of one party that equity would require granting custody to that parent." *Divers v. Divers*, 856 So. 2d 370, 376 (Miss. Ct. App. 2003). This was clearly the case as the Court's determination that Kimberly had in fact a prescription drug abuse issue and the Court's findings of the Mother's other negative actions that stemmed from her drug abuse clearly outweighed the other factors in determining what was best

for the minor children. The Court determined that Kimberly's drug dependence was so strong that the Court order her to meet with an addictionologist. (Vol. III Tr. Pg 219 Ln. 14-15).

In *Gutierrez v. Bucci*, 827 So.2d 27 (Miss. Ct. App. 2002), the Court analyzed the relative *Albright* Factors in determining that the father was the proper custodial parent. The Court noted the children were in good health and that the father was the primary care giver for the first two factors. *Id.* at 31-32. The chancellor also felt the father provided the best parenting skills and willingness and capacity to provide primary care based on the witnesses' testimony. *Id.* at 33. Concerning the health and welfare of the parents, the chancellor found that this factor also weighed in favor of the father as the mother misused prescription drugs. *Id.* at 34. Finally, the chancellor found that the stability of the father's home environment exceeded that of the mother's. *Id.* at 36. In the case at hand we similarly have a father that has been the primary care giver and a mother with a prescription drug problem, along with what the Chancellor characterized as theft and criminal behavior that could put her in the penitentiary.

The Court should view a prescription drug abuse problem as seriously as an illegal drug abuse problem, and as such, clearly this one factor should weigh more than others. In *Johnson v. Gray*, 859 So. 2d 1006 (Miss. 2003), the Court



reviewed another case wherein the mother abused prescription drugs. The Court granted custody to the father, because he “will be able to provide a continuing stable environment” while the mother was ruled unfit due to her drug abuse and the fact she was unable to prove she was sober more than a few months. *Id.* at 1015. In the case at hand, Kimberly was found by the trial court to be stealing prescription drugs within a week of the trial. (Vol. III. Tr. Pg. 203 Ln. 4-6). Similarly, in *Lawson v. Lawson*, 821 So. 2d 142, 146 (Miss. Ct. App. 2002), the Court granted initial primary custody following a divorce to the father because of the wife’s history of prescription drug abuse stemming from originally prescribed medication where the father appeared, “to be the more emotionally stable parent.”

As such the Chancellor’s granting all *Albright Factors* equal weight was clearly erroneous and manifestly wrong when clearly Kimberly’s drug abuse outweighed any additional free time her lack of gainful employment granted and outweighed any consideration of the tender years of the minor children.

### **3) The Court Improperly Weighted the *Albright Factors*.**

In reviewing the *Albright Factors*, the Court broke them down into twelve factors. Based on the children’s ages of three and two he ruled that Home and School Record and Preference did not apply and were thus equal. (Vol. III Tr. Pg. 216 Ln. 1-12). Further he ruled the emotional ties were equal between the parties

as the testimony indicated both children clearly loved each parent. (Vol. III Tr. Pg. 213 Ln. 18- Pg. 215 Ln. 20). He additionally stated Stability was equal between the parties despite Kimberly's moves, cohabitation, out of wedlock child, stays in rehab clinics, and lack of employment despite her attempts to sell frames, and Matthew's maintaining the same residence on his family land and maintaining the same job for the two-year period prior to trial. (Vol. III Tr. Pg. 216 Ln. 13-25). Further the Court found that Continuity of Care did not apply because this was not a divorce case but a Petition to Modify.

As for Kimberly, the Court found that Age, Health and Sex favored her because of the Tender Year's doctrine, and Capacity to Provide Primary Care and Employment Responsibilities favored the mother since her attempts to sell frames left her at home with few responsibilities. (Vol. Tr. Pg. 208 Ln. 21-22; Pg. 212 Ln. 19-24). The Court divided Parenting Skills into two categories; Capacity and Good Judgment. (Vol. Tr. Pg. 210-211). The Court gave Capacity to Kimberly again because of her abundant free time in accord with her attempts to sale frames and Good Judgment to Matthew because of his lack of making the same choices involving drug abuse as Kimberly. (Vol. III. Pg. 210-211; 211 Ln. 11- Pg. 212 Ln. 19). As for Matthew, the Court also determined Physical and Mental Health

avored him and Moral Fitness favored him. (Vol. III. Pg. 213 Ln. 3-17; Pg. 215 Ln 22-29).

Additionally the Court erred in finding that the continuity of care was equal between the parents. First Kimberly left the children with Matthew for months while in her rehabilitation stay. Secondly Matthew had a January to May period of primary custody while waiting for the final hearing of this case by agreed order of the parties. A similar case found that the Husband having primary care during this period prior to trial was clearly the provider of continuity of care. "The court found that the continuity of care was in the father's favor because the mother agreed for the children to live and go to school in Senatobia." *Richardson v. Richardson*, 790 So. 2d 239, 243 (Miss. Ct. App. 2001). *Richardson* was a modification case. *Id.* at 240.

Matthew's extended greater custody since the property settlement clearly establishes him as the primary custodian parent post separation contrary to the Court's ruling. At the Hearing on Petitioner's Motion To Alter or Amend the Judgment the Court expressed the opinion of the Court that continuity of care only applied to divorce cases since the continuity was by Court order. However again the parties entered into an Agreed Order prior to the Final Hearing in which Matthew was granted Primary Custody for a nearly five-month period. Further

*Richardson*, was a modification case thereby refuting that presumption. *Id.* at 240. The agreed order established continuity of care prior to the hearing with Matthew.

Additionally the Court essentially held against Matthew that he is gainfully employed while Kimberly was unable to find gainful employment according to her testimony. (Vol. II. Pg 53 Ln. 14-17). Further the Court applied Kimberly's abundant free time as Capacity to provide care in two different factors, both Employment Responsibilities and Capacity and Parenting Skills, a clearly erroneous interpretation of the factors. Kimberly will attempt to argue that she works making frames despite any evidence that this provides meaningful income or is more than a hobby. The Court has given as an *Albright* factor the stability of employment as part of Stability Of Home Environment and Employment of Each Parent. While Kimberly gets credit for greater time to spend with the children due to her inability to hold a job, the Court must also hold this against her as failure to find stable employment to provide for the two minor children. Especially since with equal custody she does not receive child support and thus is responsible for providing for the children while in her care.

Similarly, in *Pacheco v. Pacheco*, 770 So. 2d 1007, 1011 (Miss. Ct. App. 2000), the chancellor noted that husband was much more stable in this area as he had held the same job for approximately sixteen years while the wife had only

found a job for roughly a year before finding the factor was in the husband's favor and granting custody to the husband.

The Court applied the tender years doctrine to find that the Age, Health, and Sex of Child factor favored the mother. The children are young, but they are both male children. Therefore, at worst this factor should have been considered equal between the two parents. In *Steverson v. Steverson*, 846 So. 2d 304, 306 (Miss. Ct. App. 2003) the Court of Appeals affirmed a chancellor's ruling that, "because both children were boys, as well as noting the law's compelling interest in keeping siblings together, this effectively outweighed the 'tender years' presumption." *Id.* Further the Court is not to give weight to the tender age doctrine when the mother was not the primary care giver. "The maternal preference in this case may not be warranted in light of the fact that the father had primary care-giver status for the ten months prior to the custody hearing." *Blevins v. Bardwell*, 784 So. 2d 166, 173 (Miss. 2001) As was previously discussed, prior to the final hearing on this matter Matthew had primary custody for a January till May period.

Finally, the Court was presented with the potential problem that the parents lived in different school districts. The Court noted the potential problem and that "one of y'all needs to make a hard decision and move closer to the other. You need to do the appropriate investigation over what school district is best for your

children.” Therefore the Court clearly foresaw the upcoming problem that the current custody arrangement will become unworkable upon the children reaching school age if one parent does not move to the other county. Clearly the commute for the children to attend school would become unduly disruptive. *Torrence v. Moore*, 455 So. 2d 778 (Miss. 1984).

Clearly the Court’s multiplying of Capacity into multiple factors, over application of the tender years doctrine, and failure to apply Home and Work Stability was a clearly erroneous interpretation of the *Albright* Factors and was in manifest error.

### CONCLUSION

The Trial Court clearly interpreted the *Albright* Factors erroneously by both dividing factors and ignoring others just to reach an arbitrary equaling point. Further it was clearly erroneous to grant each factor equal weight when clearly Kimberly’s lack of moral fitness, judgment, and physical health outweighed any other factor and necessitate the boys be placed in primary care of their stable father. The potential harm to the boys, the Court correctly found the boys in, outweighed any advantage of Kimberly’s free time. Therefore this Honorable Court should reverse and render a judgment in favor of the Appellant, Matthew McMullin granting him primary custody of the two minor children.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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This the 11th day of May, 2011.

  
George C. Nicols