IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHARON THOMPSON FLOWERS, APPELLANT,

v. NO. 2010-CA-01957

ALLEN FLOWERS, APPELLEE.

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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v. **NO. 2010-CA-01957**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sharon Thompson Flowers, Appellant
2. Allen Flowers, Appellee
3. Oliver E. Diaz, Jr., attorney for Appellant
4. David Neil McCarty, attorney for Appellant
5. Kate S. Eidt, attorney for Appellee
6. Honorable J. Larry Buffington, Special Chancellor, Forrest County Chancery Court

Kate S. Eidt

Kate S. Eidt
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STATEMENT OF THE ISSUES:

Whether or not the Chancellor erred in awarding physical custody of two male children to the father.

STATEMENT REGARDING ORAL ARGUMENT:

As shown below, there is no error of law and there is substantial record evidence to support the Chancery Court's findings and custody award. Because oral argument would be no more than a third hearing on facts decided below and an academic exercise on how the Appellant believes this Court should dramatically re-write the law of custody, oral argument will not assist this Court and Appellant does NOT request oral argument.

STATEMENT OF THE CASE:

The primary issue below was child custody, and the Chancery Court got it right in awarding physical custody to Allen. Sharon's multifarious arguments can be summarized as a single consideration of whether substantial evidence supports the Chancery Court's findings and custody determination. Because abundant evidence supports the Chancery Court's findings and custody determination to Allen, this Court need follow Sharon's twisted path no further.

For completeness, Allen also demonstrates below that while there are rulings each party may dislike, there is no error. The Chancery Court's Albright analysis is not nearly so close as Sharon seeks to portray, and none of Sharon's arguments impugn the Chancery Court's analysis or conclusions. The Chancery Court scored the Albright analysis with 4 for Allen, 1 for Sharon, and 6 neutral. The Guardian ad litem's Albright score was 5 for Allen and 1 for Sharon. By either count Sharon came up short.

At bottom, Sharon asks this Court to re-weigh the evidence. Sharon also stretches caselaw

beyond the breaking point to try to manufacture error, and asks this Court to make new law. Because Sharon lacks support from both the facts and the law, and because there is abundant record evidence to support the Chancery Court's decision, Sharon still comes up short. Perhaps more important, Sharon offers nothing to challenge the Chancery Court's finding that the best interests of the children are served in Allen's custody. This Court should affirm.

FACTS AND PROCEDURAL HISTORY:

Allen and Sharon Flowers were married in December 2004. They have two male children, Charlie (age 10) and Joseph (age 6). Sharon did not work outside the home and Allen supports the family. The family lives on a 43-acre farm that Allen has owned since 1999. R at 305-7.[1]

Although Sharon handled the bulk of the child-rearing responsibilities when the children were infants, a more equal sharing evolved as the children grew. For example, Allen was responsible for 90% of the children's education, 99% of their religious training, R. at 323, church attendance, discipline, hands-on maintenance/repairs training, R. at 333, and some medical care. R. at 523-24. Allen was also heavily involved with buying groceries and clothing, cooking, housework and laundry, R. at 332-33, and he taught Sunday School at the childrens' home church. R. at 71. Despite her "stay-at-home mom" rubric, Sharon had help with the children through overnight visits from her mother "all the time," R. at 489, 246, through visits from one friend every week, R. at 293, and from frequent weekend and holiday visits from family friends. R. at 12-13, 17-19, 23, 71, 73, 493-94.

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[1] Citations to the Record or Transcript are shown as "R" with the corresponding page following, citations to Appellant's Record Excerpts are referred to as "RE", and citations to Appellant's Principal Brief are referred to as "Brief" followed by the applicable page.

At the beginning of Charlie's second grade year in school, routine school testing revealed a severe reading deficit. Allen immediately pursued the issue and learned that Charlie suffers from phonemic-awareness deficits similar to those exhibited by Sharon and Sharon's oldest son by a former marriage. R. at 85-88. In early September 2008, Allen began working with Charlie's teacher on a daily basis to address the issue, R. at 92, 324-27, and changed his office schedule to work with Charlie most afternoons. R. at 324-25. Through Charlie's hard work , dedication and raw intellect this intervention shows promise and Charlie's grades remained good. R. at 325-26, 362-63. Because of the nature of Charlie's deficit, Allen arranged for Charlie's 2nd-grade teacher to tutor Charlie. R. at 328-29.

In the Spring of 2008 Allen became aware that Sharon was having an affair with a married man who lived in Texas. R. at 539-40. This man ("Chris") was someone whom Sharon had been romantically involved with in the past, and is--according to Sharon--a troubled alcoholic ("my little drunk friend"). R. at 27, 339. Sharon carried out portions of her affair by extended phone calls and text messages, R. at 25-27, by going outside for long periods or hiding in the home. R. at 413. As suspicions grew about Sharon's affair, Allen began listening to Sharon's phone conversations. R. at 339.

Sharon then made four trips to Texas, ostensibly for benevolent purposes, in the early Fall of 2008. R. at 340, 352, 513-18. Sharon knew that Allen did not believe her explanations for this travel. R. at 516. The last of Sharon's forays to Texas lasted for nine days. R. at 18. The children were with Allen during Sharon's travel periods, and during Sharon's increasing time spent on the phone with Chris. Allen testified that Sharon was distant and distracted during this period, R. at 413, and Sharon did not deny this. Allen enrolled Joseph in full-time daycare because Sharon's focus on

her affair rendered her unreliable. R. at 518. Sharon complained but did nothing to alter her behavior. Id.

Sharon then began to discuss another trip to Texas, this time for an ostensible birthday party for Chris' sister-in-law. To complete the ruse Allen was even invited but was not fooled. Allen learned that Sharon actually planned to use this trip to abscond with the children and secrete them in Texas until Allen bowed to a divorce. R. at 340-41, 14-15, 28. Sharon admitted that she did not intend to return as advertised, R. at 44, and Allen testified that Sharon's packing for this trip far exceeded that needed for a weekend journey. R. at 341. Sharon had done essentially the same thing several years before when she clandestinely moved herself and Charlie to Florida. R. at 340, 382.

Just days before Sharon was set to flee, on November 20, 2008, Allen filed a Complaint For Divorce on grounds of adultery, desertion and habitual cruel and inhuman treatment. Allen also sought custody of the children. In response to Sharon's looming departure, Allen sought a Temporary Restraining Order to bar Sharon from taking the children to Texas. R. at 352. Allen cited Sharon's affair with Chris, her surreptitious plot to remove the children from the jurisdiction, Sharon's un-natural trip preparations, and Sharon's prior completion of just such a plot several years before. On November 21, 2008, Chancellor James H.C. Thomas, Jr. issued a TRO without notice.

Sharon moved to dissolve the TRO, and on November 26, 2008, Chancellor Thomas did so but enjoined removal of the children from the jurisdiction without leave of Court. At Sharon's request, Chancellor Thomas awarded joint custody–with the children to remain in the house and the parents to move in/out on a rotating 7-day basis. Allen was ordered to pay Sharon child support, to pay all household bills and to pay all medical expenses. Because Allen is a practicing attorney in the Hattiesburg area, all local Chancellors then recused and the Supreme Court appointed Hon. Larry

Buffington to hear the remainder of the case.

On May 4, 2009, at Sharon's request Chancellor Buffington lifted the travel restriction and awarded Sharon $300 per month temporary alimony. At Allen's request Chancellor Buffington enjoined both parties from "having the children in the presence of a boyfriend or girlfriend," from having pets in the house, and from removing personal property from the residence. Chancellor Buffington appointed a Guardian ad litem ("GAL") to investigate the claims of the parties and make recommendations on the ultimate custody disposition.

Among Allen's areas of concern were Sharon's affair with Chris, Chris' alcoholism and it's potential impact on the children, and Sharon's serious mental health issues that were discovered in psychological testing after Sharon fled to Florida with Charlie. The GAL thus directed the parties to submit to psychological testing with Dr. Beverly Stubblefield, Ph.D.

By report to the GAL of January 16, 2010, Dr. Stubblefield found that Sharon's testing showed "a tendency to give true responses indiscriminately," and that Sharon has a profile that "usually suggests rejection of the traditional female role." Dr. Stubblefield's diagnostic impression of Sharon included the personality disorders described as Borderline Personality Disorder, Passive-Aggressive, Histrionic and Antisocial Traits. Dr. Stubblefield thus recommended that physical custody be awarded to Allen, and that Sharon get treatment and "gain financial independence".

On June 24, 2009, Allen moved to modify the temporary order because the joint-custody arrangement was harming the children. Allen also sought additional psychological testing of Sharon, and asked the Court to sanction Sharon for her continued refusal to abide the terms of the temporary order. On March 10, 2010, Allen filed a motion to order Sharon to waive her medical privilege so that psychological testing could be completed, and to modify temporary custody. After hearings that

produced no written orders, the matter was set for trial and the parties agreed to a divorce on grounds of Irreconcilable Differences, that the Antenuptial Agreement is valid, and that the primary issues for trial were child custody and support.

Based on Dr. Stubblefield's report and her own wide-ranging investigation, the GAL issued a report that recommended physical custody be awarded to Allen. Trial Exhibit 3 at 20. The GAL "scored" the Albright analysis as 7 neutral, 3 for Allen and 1 for Sharon. Trial Exhibit 3 at 17-20.

The matter came on for trial on January 19, 2010. During examination of Allen's first witness the Chancellor ruled that no evidence of events prior the marriage would be admissible. R. at 9. This ruling was later modified to allow some testimony of pre-marriage issues "if it addresses Albright factors." R. at 322.

Allen's second witness, Ms. Geri Duckworth ("Aunt Geri"), testified that Sharon frequently needed help with the children, R. at 12-13, 17-19, and she was happy to oblige, even when Allen "was furious with" Sharon for what he viewed as excessive invitations. R. at 493. Aunt Geri also testified that Sharon's mother was present to help Sharon on a regular basis. R. at 23. Aunt Geri testified that she and Sharon were very close friends, and that Sharon had confided to marijuana use at the marital homestead. R. at 14. Sharon kept the marijuana pipe for her future use. R. at 65-66. Sharon even sought advice about how to get a divorce from Allen, and admitted her adultery in the process. R. at 14-15.

Aunt Geri testified about how Sharon's texting and phone contact with Chris removed her from the family, see, R. at 26-27, affirmed Sharon's keen awareness of Chris' alcohol addiction, R. at 27, and confirmed that Sharon wanted a divorce to move to Texas. R. at 28. Sharon advised Aunt Geri that she had obtained divorce counsel prior to her final Texas trip. R. at 45.

Allen's third witness was Ms. Imogene Huffman, who testified that she has kept the children for both parties. R. at 71, 73. Ms. Huffman testified that she had kept the boys for Allen "once or twice" after the separation. R. at 77. Ms. Huffman confirmed that Allen has been responsible for getting the children to church, R. at 72, and does so regularly, R. at 71, but that Sharon rarely attends. R. at 72.

Allen's fourth witness, Ms. Beth Ladnier, was Charlie's second grade teacher and the one who first brought Charlie's reading deficits to light in September 2008. R. at 85-88. The Chancellor quickly grasped the scope and urgency of this issue. R. at 87-88, 89-90. Ms. Ladnier testified that Allen handled Charlie's early reading intervention, and that she had seen Sharon at school maybe twice. R. at 94, 105, 109. Ms. Ladnier testified that she was tutoring Charlie with good progress, but only when Allen had custody. R. at 95.

The Chancery Court ruled that tutoring would be had four days each week, regardless of which party had custody, R. at 101, and directed the parties to "start next week." R. at 102. The Chancery Court specifically ruled that tutoring was to continue during the summer break from school. R. at 107-08. This order was never memorialized.

The last witness on that first day of trial was Dr. Stanley G. Smith, Ph.D., who is a board-certified forensic examiner, a child psychology expert and a licensed professional counselor. Dr. Smith testified that he had evaluated the parties in 2003-04 after Sharon fled to Florida, and that his test results for Sharon cause concern for the children. R. at 126-27. After discussing his differences with Dr. Stubblefield's findings, R. at 110-11, Dr. Smith opined that Dr. Stubblefield needed to go further on Sharon's testing because she was "very high on a depressive scale". R. at 125-26. Dr. Smith then testified that his evaluation of Charlie "scared the stew out of me" and shortly thereafter

the trial was halted. R. at 137.

The matter did not come back on for trial again until July 28, 2010, and resumed with Dr. Smith as the Court's expert for the children. R. at 139; see also R. at 170. Dr. Smith testified that Sharon had recently raised abuse allegations against Allen for the first time, R. at 142, which were unfounded. Dr. Smith testified that, in order to assess the children, he had to assess the parents and had done so as best he could despite Sharon's failure to cooperate. R. at 145-48, 566. In response to Sharon's objection, Dr. Smith was barred from directly discussing Sharon's test results. R. at 144. Sharon sought to explain part of her failure to cooperate by telling Dr. Smith that "I disappeared. I dropped out of sight because I had a medical issue." R. at 180.

Dr. Smith opined that Sharon did not handle Joseph well, but that Allen does. R. at 158, 160. Dr. Smith testified that Charlie is "obviously dyslexic," R. at 163, and "needs continued help at his school for his dyslexia" but has "advanced very well." R. at 165. Dr. Smith testified that Sharon had discussed Charlie's reading issues with him. R. at 185-186. Dr. Smith said that "both boys need a strong hand and a structure" that only Allen provides. R. at 166. Dr. Smith opined at that point that custody should be placed with Allen. R. at 212.

Dr. Smith later testified that the children were suffering from significant psychological issues, but that his testing shows "that Allen Flowers is not causing his children's mental upset." R. 554. Dr. Smith had definite opinions about the source of the childrens' issues, R. at 569-74, and testified that Joseph was developing personality disorders similar to Sharon. R. at 570; see R. at 591-92.

At Sharon's request to alter the order of proof, the next witness was Dr. Criss Lott, Ph.D., the Court's second expert to evaluate the parties. Dr. Lott administered what amounts to the fourth round of tests to Sharon and Allen, and Dr. Smith was troubled that Dr. Lott used outdated test forms

that Sharon had seen very recently. R. at 144, 168-170. Dr. Lott found minor issues with both parties, R. at 224-5, and noted that he had examined none of the test data from Dr. Smith or Dr. Stubblefield. R. 229.

Sharon then moved into her case-in-chief, with her mother–Virginia Thompson–testifying next. Ms. Thompson testified that she had come to help Sharon with the children "at least once" every week Sharon had the boys since the separation, R. at 246, and spent the night most weeks. R. at 247. Ms. Thompson testified that she was in the Flowers home to help Sharon "every two weeks or so" prior to the separation, and usually stayed overnight. R. at 251.

Sharon's next witness was Lainee Bufkin. R. at 293. Ms. Bufkin testified that she was at the Flowers home at least one time per week prior to the separation. R. at 293. Ms. Bufkin also testified that she was now Sharon's employer, and that Sharon had been paid $500 per week since May 2009. R. at 297; cf R. at 501-02.

Day three of trial began on July 29, 2010, with Allen. In addition to household chores of cooking and cleaning, Allen testified that he was responsible for 90% of the childrens' education and 99% of their religious training. Allen testified that he is the one who gets the children to church, R. 332-34, and that he and the boys are "outdoor guys" who do many things together R. 333. Allen testified that he is primarily responsible for child discipline, R. 332, and for transporting the children for school. R. 340, 369. Allen was further involved in Charlie's school by serving on the Parent Advisory Committee since Charlie was in second grade, R. 377, and was involved in cub scouts.

Charlie's reading challenges were discussed, and Allen verified that he changed his work schedule in September 2008 when Charlie's deficit was disclosed by Ms. Ladnier. R. at 324-31. Allen testified that Sharon refused to get involved with Charlie's reading issues when they were

discovered, R. at 324, and confirmed Sharon's prior admission that she is dyslexic. R. at 326. Allen praised Charlie's work with his reading challenges and his progress. R. at 326. Allen testified about additional testing he obtained for Charlie, R. at 328, and the tutoring with Ms. Ladnier. R. at 329. In light of the nature and origin of Charlie's reading issues, Allen obtained educational testing for Joseph. R. at 331. Allen was also responsible for completing Joseph's immunizations in preparation for Kindergarten. R. at 523.

Allen testified that he and the children are allergy sufferers, but that Sharon began bringing animals into the house after the separation despite the Court's injunction. R. 343-47. Allen testified that the children had been treated with antibiotics four times during the separation period as a result. R. at 345. Sharon confirmed that the children suffer from allergies, but continued to have animals in the house even after being ordered to remove them. R. at 456. Allen also testified that Sharon had repeatedly removed items from the marital home in violation of the temporary order, and that her later efforts caused the children to be "shocked and afraid. They felt like they had been robbed." R. 437; see R. at 314-18.

Sharon was next, on August 24, 2010, and testified that she had just bought a manufactured cottage and now had a job. R. at 440, 445. Sharon sought to downplay her failure to amend her Rule 8.05 financial declaration or her discovery responses to reflect this by updating the information at trial. R. at 445-451. Sharon had also failed to apprise the GAL of these developments. R. at 541-42.

Sharon finally confessed to adultery with Chris, but testified it was unplanned and one time only. R. 440-41. Sharon claimed she had not violated the Chancery Court's injunction against having the children around a "boyfriend" because she and Chris only had sex once. R. at 520, 504.

Sharon testified to being aware of no reading issues with Charlie, R. at 463, and opined that Charlie's tutoring is nothing but babysitting. R. at 469-70. Sharon testified that she "had no idea" that Charlie was being tutored in the Summer of 2010. R. at 522.

Sharon complained about the people who helped Allen with the boys during the separation, but testified that "my mom comes up all the time" and stays from one week to 2-3 days per week. R. at 489. Sharon admitted to removing furnishings and personal property from the home after issuance of the revised Temporary Order, but said it was only things that belonged to her and her mother. R. 534. Sharon later admitted that additional things were involved, R. at 538, but explained "I removed items when we thought that this was going to be over." R. at 529.

The Guardian ad litem was the last witness. Consistent with her first report, the GAL testified that custody should go to Allen. R. at 579. The GAL explained that, in her initial report (January 18, 2010, Trial Exhibit 3), she scored the Albright factors as 3 for Allen, 1 for Sharon, and the balance neutral. The GAL testified that Sharon's testimony "would affect the moral fitness Albright factor." R. at 579. When challenged about findings on whether Sharon's affair with Chris had an adverse affect on the children, the GAL responded "[w]ell she denied to me that she even had an affair until today." R. at 599.

The GAL noted that she also "just found out today that Sharon has a house" and thus didn't have an opportunity to do a home study. R. at 605, 580. Based on this and other evidence, the GAL scored the "stability of home and employment" factor for Allen. R. at 610. The GAL changed her "physical and mental health" score from neutral to favor Allen in light of Dr. Smith's testimony about how Sharon's personality disorders adversely affect the children. R. at 593-94. The GAL also cited Dr. Stubblefield's findings of Sharon's multiple personality disorders. R. at 592.

The Chancery Court issued the Final Judgment on September 1, 2011. Sharon filed a Motion For New Trial And For Relief From Judgment on September 13, 2010, which contains essentially the same evidentiary and legal challenges as those now before this Court. Allen's Response pointed out the same fundamental weaknesses in Sharon's case as are outlined below. The Chancery Court Denied Sharon's motion on October 28, 2010, and Sharon perfected this appeal.

SUMMARY OF THE ARGUMENT:

After four days of testimony, the Chancery Court considered the matter, made detailed findings and determined that the best interests of the children would be served by vesting custody in Allen. As required under Albright, the Chancery Court "scored" the case with 4 for Allen, 1 for Sharon, and the balance neutral. The GAL ultimately scored the case as 5 for Allen and 1 for Sharon and recommended that custody be placed with Allen. Two other Court-appointed professionals shared the opinion that custody should be with Allen. Through contrived legal arguments Sharon really asks this Court to re-weigh the evidence and make new law. Because there is more than substantial evidence to support the Chancery Court's findings, this Court should affirm.

ARGUMENT:

I. The Standard Of Review Precludes Consideration Of Sharon's Arguments.

It is by now axiomatic that, in "child custody cases, the polestar consideration is the best interest of the child, and this must always be kept paramount." Lee v. Lee, 798 So.2d 1284, 1288 (Miss. 2001). Seeming to anticipate Sharon's argument, our Supreme Court has held that while "the Albright factors are extremely helpful in navigating what is usually a labyrinth of interests and emotions, they are certainly not the equivalent of a mathematical formula. Determining custody of a child is not an exact science." Id.

Our appellate courts are "bound by the chancellor's findings unless it can be said with a reasonable certainty that those findings were manifestly wrong and against the overwhelming weight of the evidence." Bower v. Bower, 785 So.2d 405, 410 (Miss. 2000). This Court "does not reevaluate the evidence, retest the credibility of witnesses or otherwise act as a second fact-finder." Id. at 412.

In other words, "[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor." Id. Stated slightly different, our appellate courts "will affirm the child custody decree if the record shows any ground upon which the decision may be justified. . .. We will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interest of the child." Brumfield v. Brumfield, 49 So.3d 138, 142 (Miss.Ct.App. 2010). Finally, where "there is conflicting testimony, the chancellor, as the trier of fact, is the judge of the credibility of witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation." Id. at 145.

II. The 'Continuity Of Care' Award Does Not Suggest A Close Case.

Despite 21 months of litigation, a GAL, three mental health experts and over 600 pages of trial transcript, Sharon never garnered more than one Albright factor in her favor. Both the GAL and the Court awarded the "continuity of care prior to separation" factor to Sharon based upon her being a "stay at home mom."

Because Sharon's brief evinces a belief that this score provides a stable base to build upon, it must be noted that post-separation continuity of care must be given equal consideration in this Albright factor. Copeland v. Copeland, 904 So.2d 1066, 1076-77 (Miss. 2004), quoted in Montgomery v. Montgomery, 20 So.3d 39, 45 (Miss.Ct.App. 2009). Sharon and Allen shared joint

physical custody for the 21 months of this litigation, and thus could not be more equal post-separation. While Allen does not quarrel with the Chancery Court's award, Sharon's thin victory here does not indicate a close case that could have gone her way.

III. Sharon's Lack Of Moral Fitness Involves More Than Post-Separation Adultery.

Sharon's attack on the Chancery Court's "moral fitness" analysis misapplies the facts and applicable law, and is misleading in the effort to show the issue as dispositive. The 4-to-1 Albright score in Allen's favor shows that moral fitness was not the decisive factor.

Sharon seems to suggest that confessing her adultery on direct testimony removes any moral component to the underlying offense. Brief at 10. Sharon cites no legal authority for this notion and thus this Court need not consider it. See, e.g., Montgomery, 20 So.3d at 40.

If this Court does go further, Sharon simply made the strategic decision to admit the adultery rather than face further impeachment.[2] There are no Albright points to be gleaned from confessing adultery at trial–especially after having denied it for 21 months. See R. at 599.

Sharon next launches into a labored argument that her adultery cannot be used for any purpose because there is no finding of adverse impact on the children. Brief at 10-13. The cited caselaw does not stand for that conclusion, and Sharon cites no legal authority for that proposition.

More important, as the GAL made clear there was no adverse impact investigation because Sharon had denied the affair until that moment of trial. R. at 599. Sharon cites no authority for the notion that a failure to show adverse impact from an affair that has been lied about until the fourth

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[2] The feigned nobility of Sharon's confession is exposed by the predicament Sharon found herself in from her pleadings and discovery responses to the adultery issue. At trial Sharon said "I think I did the 5th. I didn't answer it." R. At 521. Sharon's assertion here that the adultery occurred "well after the separation," Brief at 10, is also curious because Sharon testified that the adultery occurred in 2008, R. at 518, and the parties separated in late November 2008.

day of trial may be capitalized upon by the deceiver. This notwithstanding, Allen did testify about the adverse impact of Sharon's affair on the family. R. at 413. Moreover, an affair can interfere with a wife's "ability to effectively parent, regardless of whether the children knew of it." Montgomery, 20 So.3d at 43, citing Mabus v. Mabus, 890 So.2d 806, 817-18 (Miss. 2003).

Despite Sharon's protest to the contrary, caselaw makes clear that adultery is a component of the "moral fitness" analysis in Albright. See, e.g., Montgomery, 20 So.3d at 43, quoting Mabus, 890 So.2d at 817-18; Copeland v. Copeland, 904 So.2d 1066, 1076-77 (Miss. 2004). The Chancery Court used Sharon's adultery for no more than this.

Sharon's suggestion that adultery was the only evidence of her poor moral fitness also misstates the evidence. For example, it does not appear that the Chancery Court bought Sharon's assertion that the adultery was a random, one-time thing: "(Q (by Court): "Why, if you picked up Chris Scharbano in New Orleans at the airport, did he have a hotel room in New Orleans? A (by Sharon): Because we stayed down there. Q (by Court): Who is we? A (by Sharon): Chris and I." R. at 542.

Sharon's lack of candor with the Court had already been seen in several other areas, as had her willful refusal to abide Court orders and directives. See supra at 11-12. Sharon had been deceptive with the GAL and Court-appointed experts as well. See, e.g., R. at 599, supra at 5. Sharon did not deny marijuana use at the family home, or that she kept the marijuana pipe for future use. See supra at 6.

Sharon's quibbling about the Chancellor's brief analysis of the morality factor runs counter to additional legal authority. Sharon cannot "presume to know what facts the chancellor did or did not consider," Phillips v. Phillips, 45 So.3d 684, 696 (Miss.Ct.App. 2010), and there is no "requirement that the chancellor must acknowledge all of the facts in his analysis of the Albright

factors that were presented at trial." Id. The Chancery Court had ample evidence of Sharon's lack of moral fitness.

There is no evidence to support Sharon's harangue about being punished for her adultery. The Chancery Court's Albright score of 4 factors in favor of Allen, and 1 for Sharon, makes clear that adultery was not the pivotal point of this case. Sharon's argument thus devolves to a request that this Court change the law by ruling that any overt use of adultery to help decide any Albright factor equals impermissible punishment. There is no error in citing Sharon's adultery as the quantum of evidence that tipped the evidentiary scale on this one Albright factor, and there is substantial record evidence to support that finding and to support the award of custody to Allen.

IV. The 'Age, Health and Sex' Factor Is Decided Correctly.

Sharon's complaint that the Chancery Court "improperly separated out the consideration of "age" from the "health and sex" components of the "first" Albright factor is at best misleading. After acknowledging that courts have analyzed age separately from health and sex, Brief at 14-15, Sharon attacks the Chancery Court for doing just that. Sharon cites no legal authority for the notion that the "form" of the Chancery Court's analysis of the "first" Albright factor is legal error, and thus the issue need not be considered here. See Montgomery, 20 So.3d at 40 (Miss.Ct.App. 2009).

A brief review of the original Albright opinion reveals that 'age' was an issue distinct from 'health and sex' of the child. Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983)("[a]ge should carry no greater weight than the other factors to be considered, such as: health and sex of the child; a determination of the parent. . .."). Contrary to Sharon's argument, Brief at 14-15, "modern courts" have not sealed the "age, health and sex" components together hermetically so that any discussion of one separate from the other constitutes error. For the most recent contrary example, in White v. White, 2009-CA-01701-COA (Miss.Ct.App. June 28, 2011), the Court remarked that "chancellors

making custody decisions must consider the age of the child; the health and sex of the child; the continuity of care. . .." Id. at 3, Para. 10.[3] Cases are plentiful where the same semantic pattern used by the Chancery Court is seen, but none of this quibbling changes the underlying analysis or goal. See e.g., Forthner v. Forthner, 52 So.3d 1212, 1215 (Miss.Ct.App. 2010); Swiderski v. Swiderski, 18 So.3d 280, 285 (Miss.Ct.App. 2009); CWL v. RA, 919 So.2d 267, 272 (Miss.Ct.App. 2005); Moak v. Moak, 631 So.2d 196, 198 (Miss. 1994).

What matters is that the Chancery Court clearly weighed each of the three components of what is now often called the "first" Albright factor. RE at 4. The Chancery Court correctly found that "age" was a neutral issue because both boys are in school. Id. Sharon's tender years argument seems to dismiss that finding, Brief at 13-14, and ignores that the children had been cared for equally for nearly two years of temporary joint physical custody. If anything, Sharon's caselaw stands for the proposition that the "age" component in this case is neutral. Brief at 13-14, citing Brumfield v. Brumfield, 49 So.3d 138, 144 (Miss.Ct.App. 2010).

There was no evidence that either child suffered from a health issue that only one party could manage, so this component also was "neutral." The GAL reached the same conclusion. See GAL's Report, Trial Exhibit 3 at 16-17, and GAL's Supplemental Report (dated July 27, 2010), Trial Exhibit 4 at 2. Resolution of this three-part Albright factor thus properly fell to the gender component, and there simply is not much to dwell on. Again, Sharon cannot "presume to know what facts the chancellor did or did not consider," Phillips, 45 So.3d at 696, and there is no "requirement that the chancellor must acknowledge all of the facts in his analysis of the Albright factors that were

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The GAL's first report also analyzes the "age" component separate from the "health and sex" components of Albright factor one, Trial Exhibit 3 at 17-18. This occurs again in the GAL's Supplemental Report (of July 27, 2010), Trial Exhibit 4 at 2, and is consistent with the Court's analysis in the Final Judgment.

presented at trial." Id.

Showing a clear pattern, Sharon cites no legal authority for her next notion that brevity equals "legal error" on this analysis. Because Sharon's argument suggests that this Court must begin to count the number of words used by trial courts and reverse as a matter of law where brevity exists, Brief at 14-15, it is worth noting that the Chancery Court used substantially fewer words to award the "continuity of care" factor to Sharon. RE at 14. There is no error here, and no new trial would change the fact that neither child is of tender years, both children are healthy, and both are boys. This factor was properly awarded to Allen.

V. Nothing Supports Sharon's Claim Of Superior Parenting Skills.

Sharon's attack on the Chancery Court's finding that the "parenting skills" factor was neutral is but a slightly-varied replay of her argument against the "age, health and sex" factor: she claims the Chancellor was too brief. Brief at 15. Once again Sharon seeks to create an issue without any legal authority, and thus once again this Court is under no duty to consider the argument. See Montgomery, 20 So.3d at 40 (Miss.Ct.App. 2009).

This argument is also premised on an evidentiary weight dispute that the Chancery Court rejected twice. Sharon's argument appears blind to glaring record evidence that supports the finding. Perhaps most notable is that the parties had shared joint custody under the temporary order for almost two years, with each party coming into the house with the children every seven days. Not once did Sharon seek to modify that temporary order, out of concern for the children or otherwise. Not once did the GAL seek to modify that temporary order out of concern for Allen's parenting, but the GAL did seek to modify the order to remove the children from Sharon's care. R. at 414. Allen filed motions to remove the children from Sharon's care twice.

Prior to the separation, Sharon left the children with Allen four times in 2008 alone for

In addition, the record makes clear that Sharon had help with the children on a weekly–if not daily–basis before and after the separation. R. 12-13, 23, 71, 246, 251, 293, 489. If counting heads somehow matters, prior to the separation Sharon used three of the five people that Allen turned to after the separation. R. 12-13, 71. The other two providers Allen used were Charlie's tutor and Joseph's God-mother (and Allen's secretary) who helped transport children on a few occasions. R. at 370. Only Sharon denies the need for the tutor despite clear Court findings and directives, see R. at 101-02, and Allen explained that the tutor's expanded role in the summer was caused by Sharon's refusal to abide the Court's order R. at 370-71.

Allen testified that the primary purpose of the four care providers was to "give the boys unconditional female love, like they do not get unfortunately any more from their mother." R. at 408. Allen's inclusion of family and friends during the difficult custodial arrangement of the separation period also brought stability to the children. Allen believes that 'it takes a village,' and while Sharon argues that she is all these children need her actions tell a different tale. Sharon's attempt to create an issue misses on the law and the facts and smacks of sour grapes. Ample record evidence supports the Chancery Court's finding on this Albright factor.

VI. The 'Home, School and Community Record' Analysis Favors Allen.

Sharon is mis-characterizing the Chancery Court's finding on this factor. Brief at 17. While the Chancery Court did say "based solely on the fact that the children are school age and have been attending school in the homestead's district", Brief at 17, other issues are clearly at work. Indeed, since Sharon has asked this Court to reverse a Chancellor for brevity several times now, it is worth noting that the Chancery Court spilled as much ink on this factor as on the 11th Albright factor that Sharon decries. See infra at 21-23. Even a cursory glance at all of the issues cited by the Chancery Court reveals that substantial record evidence supports this finding in favor of Allen.

extended travel to pursue her Texas interests. R. at 513-515. When Sharon became unreliable to help with primary care Allen placed Joseph in full-time daycare. R. at 518. Sharon complained but did nothing about this obliteration of her "stay-at-home mom" facade. Id. Sharon's claims of travel to Texas for benevolent purposes did not fool Allen, but her repeated decision to place the "needs" of herself and others ahead of her children illustrates her true ability to provide primary child care.

Sharon also cites no legal authority for the argument that the Court's "continuity of care" finding must perforce mean that she carries the "ability and willingness" factor under Albright. Brief at 15. Sharon cites no authority for the notion that such "double-counting" is appropriate. Because the "continuity of care" factor is clearly retrospective while the "ability and willingness" factor is prospective, Sharon's effort to combine the two is either misguided or disingenuous.

In summary, since at least November 2008 Allen had been providing primary child care as much as Sharon had. Allen provided that care in his own home, which is essentially the only home the children had ever known, and which Allen would retain. Until the fourth day of trial–in August 2010--nobody but Sharon knew whose "home" she would live in after at the divorce, or where that might be. Until then nobody but Sharon knew that Sharon had income beyond temporary child support and alimony. Other red flags include Sharon's delay of critical testing for the children because she just "disappeared" due to an unspecified health concern. R. at 180. While nobody spent time doubting Sharon's willingness to have custody, there were many reasons to question her ability to be the custodial parent, and no expert opined that Sharon should have custody.

Sharon then seeks to create more new law by arguing that the number of family members and care providers Allen used during the separation somehow proves poor parenting skills. Once again Sharon cites no legal authority for the notion, and the Chancery Court rejected this argument at trial and again in denying Sharon's motion for a new trial.

First, the Chancery Court noted that the children have resided solely in Allen's home except for the time Charlie spent away during Sharon's Florida escapade. RE at 15. Second, the only primary school that either child had attended is the public school in Allen's district. Id. Third, as the GAL reported, neither child was particularly active outside of school and church so there was no community record to evaluate. It thus cannot be gainsaid that the Chancery Court omitted crucial considerations from this tri-partite Albright factor, or focused improperly on one component.

Moreover, Sharon has cited no legal authority for the argument that a Chancery Court's failure to itemize each component of this 3-part factor on the record is reversible error. This Court is thus not bound to consider this attempt to contort the Albright analysis into a "mathematical formula" as part of some new "exact science" for determining custody. Lee v. Lee, 798 So.2d at 1288; Montgomery, 20 So.3d at 40 (Miss.Ct.App. 2009).

Sharon's argument also once again ignores her role in what she claims is a dearth of record analysis. Sharon seems to argue that the Chancery Court did not make a determination that the children would necessarily have to change schools if she won custody. Brief at 17. Again, until the fourth day of trial nobody knew where Sharon might be living after the divorce. R. at 605.[4] On January 18, 2010, the GAL's first report put Sharon on written notice that her failure to secure "permanent residency" was a concern. Trial Exhibit 3 at 17. Since Sharon offered no evidence about how her move might impact the children, there was nothing for the Chancery Court to consider. Sharon cannot now profit from her errors, and essentially asks for a new trial on the issue when none is warranted. Substantial evidence supports the Chancery Court's findings here.

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By agreed Order of December 11, 2009, Sharon conceded formally that the Antenuptial Agreement is valid and thus removed any doubt that Allen would retain the homestead property titled in his name only.

VII. Sharon's Refusal To Help Her Child And Follow Orders Has Consequences.

Sharon's indignation over the Chancery Court's award to Allen under Albright factor 11 is a red herring. During the first day of trial, the Chancery Court clearly found that Charlie needs tutoring for his reading issues. R. at 101-02. The parties were just as clearly ordered to obtain tutoring four days a week, even in the summer R. at 102, 108. Sharon was present at trial, so her claim that "she had no idea" about the tutoring is incredible. R. at 522. Sharon's trial counsel was sufficiently aware to later suggest that the Chancery Court's oral order was meaningless, R. at 371-73, but his efforts were in vain. This was not a "school" issue but rather reflects Sharon's refusal to tend to a child's special needs and her open defiance of a direct court order that was designed to help the child.

Sharon's continued insistence that Charlie has no reading challenge is yet another effort to have this Court re-weigh the evidence. Dr. Smith clearly found the issue, R. at 163, 165, testified that Sharon had previously acknowledged the issue to him, R. at 142, and the Chancery Court quickly grasped the issue as one of reading skills rather than intelligence. R. at 89, 96. Sharon had 8 months to obtain her own expert to challenge these findings but chose instead to rely on her own expertise and to demonize everyone who is actually working on the problem.

Nobody but Sharon argues that a child's grades in the first three years of school indicate that an inherited reading challenge has been conquered. Brief at 18-19. The Chancellor opined that "there's no question he's got a learning problem," R. at 98, and lamented that "it never ceases to amaze me that sometimes we let a kid slip the crack, that could have gotten more help." Id. The Chancery Court summed it up with: "[i]f you can't read, you can't go anywhere," id., and "if you don't get that basis right now, then he's going to suffer in the long run." R. at 99.

Sharon continues to substitute her judgment for that of the Chancery Court and Court-

appointed experts, and refused to alter her schedule to fit the inconvenient needs of a child. Sharon then belittles Allen for taking the child for tutoring during the school year, and arranging for additional tutoring in the summer to compensate for Sharon's refusal to comply with the Court's order. R. at 370.[5] While Sharon was hardly "condemned" for her open disregard for the mandate of the Chancery Court and for ignoring the special needs of a child, Brief at 19, Sharon's misconduct has consequences and the eleventh Albright factor is tailor-made for addressing such issues. Substantial record evidence supports the Chancery Court's finding.

VIII. Custody With Allen Promotes The Best Interests Of The Children.

The Chancery Court's Albright factor 11 ruling also illustrates the larger point of this case. Not once in her Brief does Sharon describe how her history as a stay-at-home mom reveals that she has what is in the best interests of these two boys to grow up with. Until the fourth day of trial nobody but Sharon knew whose home she would live in or how she proposed to finance that lifestyle. Similarly, Sharon's failure to update her Rule 8.05 Financial Declaration and discovery responses was never explained, and the conflict between Sharon's job and income testimony and that of her "employer" inspired little confidence that Sharon was prepared to meet the needs of the boys on her own. Compare R. at 297 with 501-02.

An inordinate portion of the record is filled with Sharon's dogged effort to hide her personality disorders. Sharon's refusal to cooperate with Court-ordered testing--after her eleventh-hour attack on Allen backfired–illustrates more self-preservation than concern for the needs of her children as they struggle with the impact of her disorders. The irreconcilable conflict between

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To reiterate, this is not the only Court order that Sharon refused to follow: Sharon exposed the children to Chris, continued to have pets in the house, and took personal property from the marital home repeatedly. See supra at 8, 10-12. Sharon was also was very uncooperative with Court-ordered psychological testing. Id.

Certificate Of Service

I, Hon. Kate S. Eidt, Counsel for Appellee, do hereby certify that I have this day caused to be mailed, via First Class Mail, postage prepaid, a true and correct copy of the above and foregoing Brief Of The Appellee to:

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This the 12th day of October, 2011.

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