**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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| **SHARON THOMPSON FLOWERS** | **APPELLANT** |
| **v.** | **No. 2010-CA-01957** |
| **ALLEN FLOWERS** | **APPELLEE** |

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# REPLY BRIEF OF APPELLANT SHARON THOMPSON FLOWERS

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***ORAL ARGUMENT REQUESTED***

On Appeal from the
Chancery Court of Forrest County, Miss.
No. 08-1093-GN-W


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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**SHARON THOMPSON FLOWERS** **APPELLANT**

**v.** **No. 2010-CA-01957**

**ALLEN FLOWERS** **APPELLEE**

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), 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. Mark Chinn and Matthew Thompson, *Trial Counsel for Appellant*
3. Oliver E. Diaz, Jr., and David Neil McCarty, *Appellate Counsel for Appellant*
4. Allen Flowers, *Appellee*
5. Kate Eidt, *Trial Counsel for Appellee*
6. Honorable J. Larry Buffington, *Special Chancellor, Forrest County Chancery Court*

So CERTIFIED, this the 30th day of November, 2011.

Respectfully submitted,

David Neil McCarty
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## Summary of the Reply Argument

For five major reasons the trial court's Order granting custody to Allen over Sharon must be reversed.

It must be reversed because the trial court sanctioned Sharon for a one-time, post-separation liaison with an old friend.

The Order must be reversed because the Court did not properly analyze the age and health of the children. Nor did the trial court determine which parent had the best parenting skills.

Lastly, the trial court failed to properly credit the excellent school record of the children, and instead elevated a factor of its own creation above *Albright*.

The Response Brief re-argues proof put before the trial court and certainly outside the trial court's Order determining custody. The Order itself is clear, and conclusively demonstrates that the trial court simply failed to apply *Albright* in accord with established precedent, and further failed to correctly weigh which factors it did apply.

## Standard of Review

Because the trial court failed to apply the correct standard of law, any presumption of deference vanishes. For the Supreme Court "will examine [a] case de novo . . . when it is clear that the chancery court's decision resulted from a misunderstanding of the controlling law or was based on a substantially erroneous view of the law." *In re Dissolution of Marriage of Leverock and Hamby*, 23 So.3d 424, 427-28 (Miss. 2009) (internal quotations omitted).

Further, "where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error." *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001).

## I. The Trial Court Improperly Sanctioned Sharon for A Post-Separation Liaison.

Because the trial court punished Sharon for a one-time admitted liaison that occurred post-separation, the custody order must be reversed.

It is undisputed that "under our law a chancellor may not use marital fault as a sanction in custody awards." *Brumfield v. Brumfield*, 49 So.3d 138, 149 (Miss. Ct. App. 2010). In fact, "[o]ur supreme court has warned on many occasions that adultery is not to be used as a sanction against a guilty parent in awarding custody of children." *Woodham v. Woodham*, 17 So.3d 153, 159 (Miss. Ct. App. 2009); *see Bower v. Bower*, 758 So.2d 405, 412 (Miss. 2000) ("an adulterous relationship is not to be used as a sanction against a guilty parent in awarding custody of children").

The Supreme Court requires a chancellor to determine if adultery actually impacted the lives of the children at issue. "Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, *but on the other hand, may have no effect*." *Carr v. Carr*, 480 So.2d 1120, 1123 (Miss. 1985) (emphasis added). For "it may be in the best interest of a child to remain with its mother *even though she may have been guilty of adultery*." *Hollon v. Hollon*, 784 So.2d 943, 949 (Miss. 2001) (emphasis added); *Boaz v. Boaz*, 817 So.2d 627, 630 (Miss. Ct. App. 2002).

In *Brumfield*, a wife had argued that she was punished by a chancellor for adultery. 49 So.3d at 149. Yet "the chancellor was careful to emphasize that [she] was faulted for exposing the children to extramarital relationships; [the wife] was not faulted for simply engaging in adultery." *Id.* at 149. Further, "[i]n finding that the moral fitness factor favored [the husband], the chancellor also cited his leading role in the children's religious education in recent years." *Id.* The Court of Appeals held that the trial court "only not[ed] the adulteries briefly and *in the context of their impact on the children.*" *Id.* (emphasis added).

Unlike the nuanced ruling by the chancellor in *Brumfield*, here there is the inescapable conclusion that the trial court sanctioned Sharon for the one-time liaison. The entirety of the trial court's moral fitness analysis was:

> Although both parties expressed questions as to the other having affairs, the evidence presented at trial by the admission of Sharon having had an affair after the separation of the parties, provides more than speculation. Based on this, this factor favors the father.

R.E. 15. This simplistic, binary test is devoid of any rationale save one—that because Sharon had an affair, the factor favored Allen. Indeed, the trial court held exactly that: "Based on *this*, this factor favors the father." (emphasis added). The admission of the one-time event therefore resulted in an immediate forfeit of an entire factor of custody, without the trial court examining the impact of the children.

To the extent there was any evidence of how this impacted the children in the Record, it was in favor of the factor being neutral. The guardian ad litem conceded she had "no knowledge that it's affected the children." R. 7:599. Further, she said "I'm not saying that it adversely affected the children." R. 7:599. Nonetheless, the chancellor ruled the factor weighed in favor of Allen.

In *Brumfield*, "the chancellor was careful to emphasize that [the wife] was faulted for exposing the children to extramarital relationships; [the wife] was not faulted for simply engaging in adultery." 49 So.3d at 149. The trial court in this case made no such distinction; the ruling simply contains reference to Sharon's conceded liaison, which results in the factor favoring Allen. In ruling for the husband in *Brumfield*, "the chancellor also cited his leading role in the children's religious education in recent years." *Id.* There was no such reference in the case at hand. The only reference to "moral fitness" comes in sanctioning Sharon for her admitted, one-time liaison.

Allen attempts to bolster the trial court's ruling by gleaning scattered asides from throughout the Record. Indeed, his argument heading is entitled "Sharon's lack of moral fitness involves more than post-separation adultery." Response at 14. Yet there was no such ruling from the trial court; the chancellor made clear in his Order that the adultery was the *sole* reason he ruled against Sharon. To be clear, there was no evidence presented that this was anything more than a fleeting, one-time event. Importantly, it happened post-separation. No matter Allen's clear bias against his now ex-wife, the trial court rested the entirety of its ruling on this one-time, post-separation event.

The case law is clear that adultery may not be used as a dispositive factor against a parent, and here the trial court clearly did that. Allen does not dispute the law announced by *Brumfield*, *Woodham*, *Bower*, or *Carr*. He simply refuses to address them, and ignores the obvious sanction by the trial court against Sharon.

As the Court of Appeals noted last year, "Our courts have not been reluctant to reverse custody decisions where the chancellor placed too much weight on one parent's sexual misconduct while disregarding the other *Albright* factors." *Brumfield*, at 149. In this case, the trial court clearly placed too much weight on Sharon's admitted action, and as a result unbalanced the *Albright* analysis in favor of Allen.

This sanction is in violation of decades of precedent applying *Albright* and mandates reversal of the custody Order.

## II. The Trial Court Failed to Properly Analyze the Age, Health, and Sex Factor.

Because the trial court rested the entirety of its decision on one *Albright* factor on the sex of the children, the Order must be reversed.

The *Albright* factors are a familiar touchstone to our appellate courts. There are multiple factors, and for many years they have been segmented into these certain categories. See *Phillips*

*v. Phillips*, 45 So.3d 684, 693 (Miss. Ct. App. 2010) (dividing the factors into numbered categories). The "age, health and sex of the child" is considered as one complete factor. *See* Prof. Deborah H. Bell, *Divorce and Domestic Relations, Child Custody*, MSPRAC-ENC § 28:11 (Jackson & Miller, eds. 2011). This is not an unusual or radical suggestion. See *Brumfield*, 49 So.3d at 144 (where "Age, Health, and Sex of the Children" is considered as a separate component of the opinion, at part B).

In this case, the trial court made a legal determination to separate the consideration of the age of the boys from their health and sex. This is a legal failure that mandates reversal for a proper consideration, for the concerns are inextricable and must be weighed together.

Further, in carving out a separate factor, the trial court overbalanced the test in favor of Allen. The entirety of the trial court's analysis of the consideration of the boys' health and sex was: "Both children are male children and therefore this factor favors the father." R.E. 14. The trial court therefore failed to undertake even the most basic weighing of evidence beyond a simplistic, binary test to determine gender.

Allen concedes that the "caselaw stands for the proposition that the 'age' component in this case is neutral." Response Brief at 17. Yet the caselaw actually weighs age along with sex and health. Indeed, multiple recent cases have determined when the parents have both nurtured and cared for the children, the *overall* factor is neutral. *See McCarty v. McCarty*, 52 So.3d 1221, 1228 (Miss. Ct. App. 2011) (finding of neutrality with a 7 and 4 year old affirmed); *Brumfield v. Brumfield*, 49 So.3d 138, 144 (Miss. Ct. App. 2010) (trial court affirmed regarding custody after "[t]he chancellor found that this factor [of health and sex of the child] favored neither parent" when "[i]t was generally acknowledged that both parents had been caring for [the child] and that both were able to continue to do so"); *Woodham v. Woodham*, 17 So.3d 153, 157 (Miss. Ct. App. 2009) (trial court affirmed a finding that "this factor favored neither party" when "[t]here was

also ample testimony from which the chancellor could find that both parents could and did take care of the child's basic needs").

Since the weakening of the tender years doctrine which placed heavy emphasis on age, the trend has been to accept neutrality when both parents are fit to care for the child. In one 2008 case, the Court of Appeals refused to overrule a chancellor's finding of neutrality between parents even when an 18-month old child was considered. *Webb v. Webb*, 974 So.2d 274, 277 (Miss. Ct. App. 2008). Nonetheless, here the trial court automatically found in favor of Allen, simply because of his gender. This is a simplistic application of the legal test and does not comport with modern case law.

At the same time, this gender bias also overweighed the test because the trial court ignored the critical issue of the health of the children. The Order is notably lacking *any* factual detail beyond the cursory acknowledgement of the children's gender. There is absolutely no determination of the health of the children, a massive component of this *Albright* factor. At trial, there was substantial testimony at trial that Sharon was the sole caretaker of the children's health, as she took the boys to the doctor and was the primary care provider for their health care. R. 6:457-58. She was the one who took care of the boys when they were infants and generally dealt with the children. R. 6:458-59; R. 4:254. Allen conceded that when the children were younger Sharon was the one who took them to the doctors and "probably" did more shopping for the boys at that point. R. 5:368. After the separation, Allen admitted that he still worked even when the boys were sick, and that he wasn't "going to apologize for working." R. 6:412.

This failure to apply the correct legal test renders the custody determination invalid. As a result, the Order must be reversed and this case remanded for an actual *Albright* determination of the "age, health, and sex" of the children.

## III. The Trial Court Failed to Determine Which Parent Had the Best Parenting Skills and Capacity to Provide Primary Child Care.

Because the trial court incorrectly determined that the parents were equal in parenting skills and their willingness and capacity to provide primary child care, the custody determination must be reversed.

In its entirety, the trial court ruled that "[t]his factor favors neither party in that both have expressed the desire and willingness to provide for the minor children." R.E. 14. Yet "desire and willingness" are only token concerns when determining which parent *actually has the best skills.* The Record is utterly clear that the more fit parent was Sharon, as recounted in the Principal Brief at 16. Most critically, Allen admitted on the stand that he had to resort to using *five* different nannies and babysitters as a parent after his separation from Sharon. He conceded that the five different babysitters would sometimes have to take the boys to school and pick them up.

The guardian ad litem disapproved of this tattered parenting skills, and warned that Allen should "not have any women involved with the children that would usurp the mother's role," further cautioning against "care takers that would step in the way of the mother." R. 7:547. The GAL did not like the rotating series of babysitters Allen used for the boys, because "there's a stability issue as far as who is going to be picking them up, who is going to be dropping them off. And it would be better if [Allen] could have one permanent care giver and maybe a back up, if an emergency was to come up." R. 7:601. She expressed a "concern with the number of women in the picture and that [Allen] should have one care giver." R. 7:604.

In his Response brief, Allen concedes that he must rely on other caregivers, and announces that is his personal belief system, because he "believes that 'it takes a village.'" Response at 20. Allen is apparently referencing the book *It Takes a Village*: *And Other Lessons Children Teach Us*, by Hillary Rodham Clinton (Simon & Schuster, 1996). With all due respect to the esteemed Secretary of State, the guardian ad litem found that it was not in the children's

best interest to have nearly a half dozen fake parents for the boys. Regardless of Allen's personal beliefs, the GAL determined that having these babysitters would usurp Sharon's role in the life of their children.

The Record also conclusively demonstrates that the Allen simply does not have the capacity to parent. There was uncontested testimony that he even used one of the babysitters to buy his children's toys and purchase stocking stuffers and batteries on Christmas Eve. When the babysitter balked at purchasing toys for the children because it was so late, *Allen told her that truck stops were open, and she should go purchase the toys there.* R. 2:55-56.

The man had not even purchased his own children presents for Christmas. He demanded one of his multiple babysitters do it—on *Christmas Eve*.

The trial court committed a legal error by carving the factor into separate components, and by ruling in favor of Allen. The Order must be reversed.

## IV. The Trial Court Failed to Properly Consider the School Record of the Children.

Because the trial court improperly weighed the school the children attended in favor of Allen, the custody order must be reversed.

The trial courts are to assess "the home, school, and community record of the child." *Hutchison v. Hutchison*, 58 So.3d 46, 48 (Miss. Ct. App. 2011). In this case, the trial court ruled that the factor weighed in favor of Allen "based *solely* on the fact that the children are school age and have been attending school in the homestead's district." R.E. 15 (emphasis added).

Yet this admitted singular determination is not dispositive of the factor as a whole. In one recent case, a father argued that the "home, school, and community record should have weighed in his favor," because "he lives in the country in a good school district and that Melissa lives in a housing project in Louisiana." *Desselle v. Desselle*, 53 So.3d 854, 857 (Miss. Ct. App.

2011). Nonetheless, the Court of Appeals affirmed the custody award by looking at the determination as a whole. *Id.*

Further, this case is unlike a recent decision where a chancellor favored a father because he "continued to live in the home and community where [the child] had lived prior to the separation," the child would be able to attend her regular school, and the wife planned on enrolling the child in a different school. *Jones v. Jones*, 19 So.3d 775, 779 (Miss. Ct. App. 2009); see also *Jordan v. Jordan*, 963 So.2d 1235, 1243 (Miss. Ct. App. 2007) (factor favored father when wife would move children to a new school).

In this case, there was no evidence presented that the children would have to move school districts, or that if they did it would negatively impact the children. Nor was any such evidence relied upon or cited to by the trial court in its cursory *Albright* analysis.

As a result, the custody determination is fatally flawed, and must be reversed.

**V. The Trial Court Placed Undue Emphasis on a Factor of Its Own Creation.**

Because the trial court improperly fractured one of the *Albright* factor into two parts, it placed a thumb on the scale in favor of the father, prejudicing the custody determination against the mother.

*Albright* allows the consideration of "other factors relevant to the parent-child relationship." *Hutchison*, 58 So.3d at 48. In this case, the trial court impermissibly split the school record of Charlie, the oldest boy, from "the home, school, and community record of the child," and termed it as an "other factor." It was legal error for the trial court to fail to include it under that factor and analyze it properly.

The Supreme Court has been clear that "where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error." *Hollon*, 784 So.2d at 946. Splitting an *Albright* determination is improper under caselaw.

Nor was this an isolated error by the trial court. As noted above, the trial court also improperly segmented the "age" component from the health and sex of the children. This shows a repeated misapplication of *Albright*, and as a result, this Court must reverse the custody determination.

## CONCLUSION

For five reasons the trial court's grant of physical custody to Allen was fatally flawed by both legal and factual errors. As a result, it must be reversed.

First, there was legal error because the trial court improperly sanctioned Sharon for her one-time, post-separation dalliance with another man. Second, there were both legal and factual errors in the trial court's determination of the age, health, and sex of the children. Third, the trial court failed to determine which parent had the best parenting skills and capacity to provide for the children. Fourth, the trial court failed to properly weigh the school record of the boys according to *Albright*. Last, the trial court committed legal and factual error by creating splitting an *Albright* factor and giving the new factor unfounded weight.

For these five reasons the trial court must be REVERSED and a new *Albright* custody analysis performed.

Filed this the 30th day of November, 2011,

Respectfully Submitted,
***Attorneys for Appellant***

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**CERTIFICATE OF SERVICE**

I, the undersigned attorney, do hereby certify that I have served by United States mail, postage prepaid, or via hand delivery if specified, a true and correct copy of the above and foregoing document, to the following persons at these addresses:

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The Honorable J. Larry Buffington
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THIS, the 30th day of November, 2011.

**DAVID NEIL McCARTY, ESQ.**