IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHARON THOMPSON FLOWERS — **APPELLANT**

v. — **No. 2010-CA-01957**

ALLEN FLOWERS — **APPELLEE**

PRINCIPAL BRIEF OF APPELLANT SHARON THOMPSON FLOWERS

ORAL ARGUMENT REQUESTED

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

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

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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 12th day of July, 2011.

Respectfully submitted,

David Neil McCarty
Miss. Bar No. [redacted]
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Statement of the Issue Presented for Review

I. Did the trial court fail to correctly analyze the *Albright* factors and therefore err in granting physical custody of the children to the father instead of the mother?

Statement Regarding Oral Argument

Pursuant to MRAP 34(b), oral argument would assist the Court in resolving this case. The trial court improperly and repeatedly misapplied the *Albright* factors in favor of the father, confusing both the law of custody and the facts in evidence before the court. Notably, the trial court split two *Albright* factors into four separate considerations, violating ample precedent and prejudicing the custody arguments of the mother. Oral argument would assist in detailing how the trial court erred in the *Albright* analysis.

Statement of the Case

This case is about the custody of the two children of a couple now divorced. The mother sought primary physical custody of the children, as did the father. The trial court determined that the husband should have primary physical custody. In doing so, the trial court altered the legal standards for custody or ignored them completely.

Aggrieved, the mother appeals, seeking primary physical custody of her children.

Facts and Procedural History

Sharon and Allen Flowers were married in 2004. R. 1:59.[1] They have two children, both boys, that are at the heart of this custody dispute. R. 1:59. Charlie is now 10 and Joseph is 6. R. 1:159.

Sharon and Allen sought a irreconcilable differences divorce, which was granted by the trial court by consent of the parties in 2009. R. 1:90. After the divorce, there was a trial to determine which parent would have physical custody of the two boys.

[1] Citations refer to the volume and page of the Record or Transcript, as in "R. at [volume one]:[page fifty-nine]. R.E. 14 refers to the Record Excerpts of the Appellant, at page fourteen.

The trial touched on many issues, but only the below facts are relevant to this appeal.

The Parenting Skills of Sharon and Allen

The trial court ruled that Sharon had "basically been a stay-at-home mom with the children." R.E. 14. Sharon testified at trial that she decorated the house, did the chores for the family, washed and ironed the clothes, did the shopping, and cooked and cleaned for the family. R.6:452-53. She did all the Christmas shopping, and was both "Santa Claus" and the tooth fairy for the boys. R. 6:453-54. Sharon was the one who took the boys to the doctor and 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.

In contrast, testimony showed that Allen, a lawyer, was often at work. R. 6:459. "There were many mornings he left between 5 and 6 [a.m.] and . . . would get home between 5 and 6," she explained. R. 6:460. She said that he would also work "at least one day a weekend all the time." R. 6:460. Sharon said that Allen "would come home, eat dinner," and then begin working at home again while she got dinner ready and prepared the boys for bed. R. 6:460-61. Sharon said that Allen "didn't do diapers," and "didn't wash [the boys'] clothes," except on "rare" occasions. R. 6:459. Speaking about Allen's relationship with his relatives, Sharon said "[h]e never wanted to go see his family," and that "[h]e did not care for his family." R. 6:443.

When the guardian ad litem testified, she noted that Sharon "was a stay-at-home mom and Allen worked long hours," and that she didn't even "think that that's contested." R. 7:584.

Sharon's mother Virginia Thompson also stated that Allen "would come in about dinner time" from his job, while "Sharon was always the one to help [the boys] and get their homework done and everything before he got home." R. 4:253. In her mind, "he left very early and most of the time he came home very late." R. 4:257.

Sharon was the one who provided the care for the children and took them to the doctors. R. 4:254. Mrs. Thompson did not recall Allen going with the children to the doctor when they were little. R. 4:254. She also recalled that Sharon did Christmas for the children and "[b]ought all the presents." R. 4:25.

Sharon's longtime friend Shauntae Schott also concluded that Sharon was the primary caregiver for the children in the family, and Sharon's sister Jenny Barnett agreed wholeheartedly. R. 4:267, R. 4:288. Sharon worked as a nanny for Lainee Bufkin, taking care of her daughter. R. 4:292. Mrs. Bufkin felt Allen "always seemed more removed from what was going on in the household." R. 4:295. She thought Sharon was a good parent—enough to hire her as a nanny, since "[y]ou don't pick a nanny that isn't good for your kids and isn't going to love your child." R. 4:296.

Allen ultimately admitted that Sharon was the primary care giver for the children, but stated he thought that was mainly when the boys were "[i]n their early months." R. 5:365. He said that when Charlie was born he was working longer than 9 to 5 hours, and "didn't have a set schedule." R. 5:366. He conceded that he would "occasionally" leave before the sun came up and return after dark." R. 5:367. He also admitted 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.

Allen's Use of Multiple Caregivers after the Separation

During the trial, Allen admitted that after he and Sharon separated he needed the help of five different people to take care of the boys. R. 5:370, 6:404. He stated that four women helped with the boys: Imogene Huffman, Jerry Duckworth, Sharon Hurley, and Elizabeth Ladnier. R.

5:370. Allen's Uncle Don Hegwood was retired and would also help with the children. R. 6:404-05. During the weeks Allen had the boys, at times he had to rely on the four different women to take the boys to school. R. 5:399. Sometimes he had to have other people pick the boys up from school, because he might be at work. R. 6:400-01.

Sharon thought that when the boys were with Allen "they have so many different care givers . . . I don't feel like they have a structure when they're not with me." R. 6:469.

At trial, the guardian ad litem recommended that Allen "not have any women involved with the children that would usurp the mother's role," and cautioned against "care takers that would step in the way of the mother." R. 7:547. The guardian ad litem did not like the rotating series of babysitters Allen used for the boys. She said that it "bothers—I guess it is a concern of mine because it does go to the boys—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.

Allen's expert was Dr. Stanley Smith, who admitted on the stand that he thought when Sharon had the boys "she is probably more 100 percent with the children, than is Mr. Flowers," who "makes arrangements I think, so he can work." R. 3:194. Dr. Smith admitted that Allen had hired multiple individuals to care for the children. R. 3:194.

The first of the five caregivers introduced at trial was one Jerry Duckworth, who testified that Allen had asked her "to become a female role model for this children." R. 2:11. Specifically, "[a] Christian woman role model for his children." R. 2:11. She was one of the babysitters for the children Allen used after the separation. R. 2:53.

After the separation, Ms. Duckworth even went to the Flowers home for Christmas. R. 2:54. She testified she played Santa for the boys after the separation. R. 2:55. She went and purchased batteries for the boys' toys. R. 2:55. Allen had not bought any stocking stuffers for the children, and so he called Ms. Duckworth and told her to get some. R. 2:55. When she protested that all the stores were closed, he told her that truck stops were open, and she should go purchase the toys there. R. 2:55-56. Ms. Duckworth then drove from Laurel to Hattiesburg to purchase toys for the children, and drove them to the Flowers home. R. 2:56. Ms. Duckworth had been at the house at nearly midnight on Christmas Eve, and then 7:30 Christmas morning. R. 2:58.

Another babysitter Allen used was Imogene Huffman, who the boys called "Granny Imogene." R. 2:70. She kept the children for Allen, but there was no set routine. R. 2:77-78.

Yet another caregiver was Elizabeth Ladnier. R. 2:83. She was Charlie's second grade teacher. R. 2:84. While she portrayed herself as Charlie's "tutor," he was her only private client, and was the first child she had tutored privately. R. 3:102-03. Sharon thought she was simply a babysitter. R. 7:522. Ms. Ladnier testified that she played video games with Charlie, took him to a movie, and went to Mr. Gatti's together. R. 3:107. She did not style these activities as babysitting, but as a 'reward" for working with the gifted student on his reading. R. 3:107. Allen also testified that sometimes Ms. Ladnier would also cook dinner for him and the boys. R. 6:404.

Charlie's Strong Academic Record

Sharon was proud that her son Charlie (now 10) was in the gifted program at his school. R. 6:465. She testified that he did not have any academic issues. R. 6:463. He got all A's and one B at school. R. at 6:468. Sharon related that the school district saw no reason to test the

gifted student for academic problems. R. 7:521-22. As a result, she did not have him tutored. R. 521-22.

Sharon believed the tutoring Charlie was getting from his second grade teacher was simply "baby-sitting," with Charlie just going over his homework and Joseph playing on a computer. R. 6:469-70. Charlie had told Sharon that his teacher "was baby-sitting him," that they were going to play or going swimming in the creek. R. 7:522. She did not know that Allen was having the boy tutored over the summer. R. 7:522.

Allen admitted that some of the tutoring for Charlie was done "[i]n part" to accommodate his work schedule. R. 5:371.

The guardian ad litem also noted that Charlie was in the gifted program, and that "[h]e's made good grades every grade." R. 7:607. She also testified that he did very well in first and second grade without the benefit of the tutoring. R. 7:607.

In fact, all parties and their witnesses agreed that Charlie did very well in school, including babysitter Jerry Duckworth. R. 2:48.

Charlie's second grade teacher, Elizabeth Ladnier, was the main person who said Charlie needed tutoring. R. 2:83-84. Her testimony was riddled with inconsistencies. She believed that Charlie had a low reading ability, but admitted that he made all A's in first grade. R. 2:85, 87. Despite his high grades, she thought he needed "to be worked with on a consistent basis *everyday*." R. 2:91 (emphasis added).

Yet after saying he needed constant help, she said that she currently only worked with Charlie "either two or three times a week." R. 2:95. She then admitted that he *did not* need tutoring five days a week, but probably three to four days a week. R. 2:95-96. She later conceded that three days one week and two the next was probably adequate. R. 3:101-02.

Despite this alleged constant need for tutoring, Ms. Ladnier admitted that she did not think Charlie was learning disabled, and that the school had not tested him for learning disability because of his good grades. R. 2:97. She also said that his reading had "improved significantly." R. 2:98.

Notably, Ms. Ladnier did not tutor any other children besides Charlie, who was the only private tutoring client she had ever taught. R. 3:102-03. She admitted that she had never personally told Sharon that Charlie needed tutoring. R. 2:95. She also did not have knowledge that Sharon had ever done anything to harm Charlie's education. R. 3:107.

For his part, Allen admitted that he did not have Charlie tutored every day either. R. 5:330. Instead, he testified that sometimes "[h]e may have missed a few days, a few Fridays we may have goofed off if he was up to speed." R. 5:330. Allen testified that he thought Charlie was "really smart." R. 5:363. Like Sharon, Allen was proud that Charlie was in the gifted program at his school, because "[i]t is a class that is only available to the children that show an extraordinary ability to reason and think out of the box . . . It's for creative thinking children." R. 5:362-63.

Sharon's Post-Separation Liaison

Sharon admitted that after she had separated from Allen she had an extremely brief relationship with another man. R. 6:440. "It was a one time thing," she explained. R. 7:519. Sharon repeatedly testified that the boys had never been alone around the one-time paramour. R. 6:441, 7:505. She said they had only been around the person for a birthday party "where there were lots of other parents and lots of other children" and at a Christmas party. R. 7:505.

At trial, the guardian ad litem specifically noted there was no evidence the one-time event affected the children, stating on the record that "I have 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.

The Trial Court's Custody Ruling

After the close of evidence, the trial court granted legal custody to both parents, but primary physical custody to Allen. Of the eleven factors considered in child support cases, the trial court determined that seven were neutral and did not favor either parent. R.E. 14-17. Of the remaining factors, one was in favor of Sharon having custody, two articulated factors supported Allen, and one "other" factor fell in Allen's favor. R.E. 14-17.

Summary of the Argument

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 splitting an *Albright* factor into two parts and giving the new factor unfounded weight.

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

Standard of Review

The Court "employ[s] a limited standard of review in domestic relations cases." *In re Dissolution of Marriage of Wood*, 35 So.3d 507, 512 (Miss. 2010). An appellate court "will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor

abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* (internal quotations omitted).

However, because the trial court failed to apply the correct standard of law, this Court must review the pleadings and make a new determination using the de novo standard. 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).

Argument

For the following five reasons, the custody order of the trial court must be reversed.

"[T]he polestar consideration in child custody cases is the best interest and welfare of the child." *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). Of the eleven factors considered in a custody case, only five are at issue today. The "health, and sex of the child;" "which has the best parenting skills and which has the willingness and capacity to provide primary child care;" "moral fitness of parents;" "the home, school and community record of the child;" "and other factors relevant to the parent-child relationship." *Id.*

Of the eleven factors, the trial court determined that seven were neutral and did not favor either parent. R.E. 14-17. As to the remaining four factors, the trial court failed to properly apply the *Albright* test and in fact created a new factor without precedent, while the rulings were marked by a distinct lack of factual support.[2]

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[2] Below is a summary of the trial court's rulings on the eleven *Albright* factors, which the court actually split into twelve parts:

1. health, and sex of the child—*Allen*
2. a determination of the parent that has had the continuity of care prior to the separation—*Sharon*
3. ~~which has the best parenting skills and which has the willingness and capacity to provide primary child care—~~ *neither parent*
4. the employment of the parent and responsibilities of that employment—*neither parent*

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

Because the trial court punished Sharon for a one-time liaison committed well after separation, the order granting physical custody to Allen must be reversed.

"Our 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").

Over twenty years ago, the Supreme Court cautioned that adultery was not a dispositive factor, because "the polestar consideration in all original custody determinations to be the best interest and welfare of the child." *Carr v. Carr*, 480 So.2d 1120, 1123 (Miss. 1985). While the "[a]dultery 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.*" *Id.* (emphasis added). Ultimately, "moral fitness is but one factor to be considered" in the greater scheme of custody. *Id.*

In the case at hand, Sharon "cleared the air" immediately on questioning from her counsel that after her separation from Allen she had a one-time encounter with a longtime friend. She detailed that it happened after her separation from Allen. She further testified that it was a one-time event. There was simply no evidence presented at trial that the one-time encounter after the Flowers' separation had any effect on the children, or even if they had knowledge of it.

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5. physical and mental health and age of the parents—*neither parent*
6. emotional ties of parent and child—*neither parent*
7. moral fitness of parents—*Allen*
8. the home, school and community record of the child—*Allen*
9. the preference of the child at the age sufficient to express a preference by law—*neither parent*
10. stability of home environment and employment of each parent—*neither parent*
11. and other factors relevant to the parent-child relationship—*Allen*

Indeed, there was evidence presented at trial that the one-time incident absolutely did not impact the children in any way. At trial, the guardian ad litem specifically noted there was no evidence the one-time liaison affected the children, stating on the record that "I have no knowledge that it's affected the children." Further, she said "I'm not saying that it adversely affected the children."

Nonetheless, the trial court did not apply *Carr* and examine whether this single incident actually affected the children. Instead, it applied a simplistic, binary test—finding that because Sharon had committed adultery it weighed against her. The entirety of the trial court's moral fitness analysis is:

> 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.

As *Carr* and ample case law has detailed, "moral fitness" is not a mechanical, either/or test. Instead, the analysis must go further to determine if the adultery actually *affected the children*. As the Supreme Court has held, it may be devastating on a family, "but on the other hand, may have no effect." *Carr*, 480 So. 2d at 1123.

In the case at hand, there was absolutely no shred of evidence that the one-time post-separation encounter affected the children at all, nor did the trial court cite to any in the order. The guardian ad litem conceded that there was no evidence that the singular event affected the children. The trial court failed to properly perform the *Albright* analysis by simply picking one parent over the other. This is not what *Albright* requires, and is in direct violation to Supreme Court precedent requiring a trial court to weigh *if* Sharon's conduct actually impacted the children.

The Supreme Court has upheld the grant of physical custody to an adulterous parent when there was much more than a one-time post-separation dalliance. In one case, a wife "admitted that beginning in 1985, she had an affair with a co-worker that lasted two years." *Moak v. Moak*, 631 So.2d 196, 197 (Miss. 1994). She then had another affair in 1989. *Id.* Afterwards, her husband was actually granted a divorce on the basis of adultery. *Id.* Despite the multiple instances of adultery, she was awarded physical custody of the children, and the husband appealed. *Id.*

In affirming the grant of custody, the Court noted with approval that "[a]lthough [the trial court] expressed reservations about awarding **physical** custody to [the wife], he attempted to focus *on the best interests of the children rather than on marital fault.*" *Id.* (emphasis in bold in original, second emphasis added). The Supreme Court then quoted the ruling of the trial court, who had held that "[c]ustody of children is not to be awarded to one parent as a reward for any particular good deed, nor is it to be denied to a parent solely as punishment for any misconduct on the part of a party." *Id.* at 197.

In this case, the trial court ruled completely opposite to the measured holding of *Moak*. The interests of the children were not considered at all by the trial court in its simplistic, binary analysis of moral fitness.

Nor is this case similar to a 2009 one from the Court of Appeals where a wife "admitted that [her daughter] was present on some occasions when she was with [her paramour]," and that "on one occasion the child came into her bedroom and climbed into the bed while she shared it with [the boyfriend]." *Woodham*, 17 So.3d at 157. The Court of Appeals affirmed that finding of problematic moral fitness because the wife's longtime adultery which had directly impacted the life of her child. *Id.*

Yet in this case, the only testimony offered at trial was that Sharon had a one-time encounter with a longtime friend well after her separation with Allen. There was no testimony that it negatively affected the children, or even that they knew about it. The children were around the man one time at a Christmas party with other adults and children present. The guardian ad litem said that she had "no knowledge that it's affected the children." The facts in this case pale to those in *Woodham*, where the child actually ventured into the adulterous bed.

In this case, the trial court punished Sharon for this single event, even though there was no evidence that the children had been adversely affected by it. Because the trial court applied the wrong legal weight to the moral fitness factor, the order must be reversed.

The chancellor also failed to examine or consider any facts which would support a finding that the moral fitness of the mother somehow damaged the children, further warranting reversal.

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

Because the trial court improperly determined that because the children were male favored the father, the order must be reversed. Further, because the trial court failed to even examine the health of the children, the order must be reversed.

Many moons ago, the appellate courts once automatically deferred to the mother in custody cases, especially when the child was young. *See Lee v. Lee*, 798 So.2d 1284, 1289 (Miss. 2001). Yet those concepts "ha[ve] been gradually weakened in Mississippi jurisprudence to the point of now being only a presumption." *Id.* Now, "the age and sex of a child are merely factors to be considered under *Albright* . . . ." *Id.*

Since the slow abandonment of the tender years doctrine, the appellate courts have begun to take note that there is no inherent "favor" in this factor simply based on gender. Instead, when the parents have both nurtured and cared for the children, the factor is neutral. *See*

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*, 17 So.3d at 157 (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").

The entirety of the trial court's analysis of this *Albright* factor is as follows: "Both children are male children and therefore this factor favors the father." R.E. 14.

In light of the modern rulings of the appellate courts in cases such as *Brumfield* and *Woodham*, this simplistic analysis is legally wrong. The trial courts are not charged to simply acknowledge the gender of the child and apportion custody to the same-gendered parent. *Albright* demands much more—that a trial court make an actual determination if age, health, and sex of the child favors one parent over the other. In modern cases, the sex of the child alone is simply not determinative of this *Albright* factor. For this reason, the trial court committed legal error, and the order must be reversed.

Further, the trial court's analysis 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.

There was substantial testimony at trial that Sharon was the sole caretaker of the children's health, and Allen conceded that Sharon took Charlie to the doctor more than him. This factor weighs in favor of Sharon.

Further, the trial court improperly separated out the consideration of age from the health and sex factor. In the modern case law, the three considerations are grouped together. *See*

Hutchison v. Hutchison, 58 So.3d 46, 48 (Miss. Ct. App. 2011) (grouping together the "age, health, and sex of the child"); *T.K. v. H.K.*, 24 So.3d 1055, 1067 (Miss. Ct. App. 2010) (same). The trial court separated "age" from the "health and sex" part of the factor, and in doing so blunted the evidence that was in favor of Sharon, highlighting its simplistic gender analysis in favor of Allen.

Yet the lack of any determination by the trial court regarding the health of the children makes any such discussion of the evidence in this case or other legal errors a moot point. The trial court's failure to weigh or even notate the health of the children is a legal error mandating reversal and consideration. The simplistic gender analysis performed by the trial court was also legal error and mandates reversal and a new trial.

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 performing an *Albright* analysis, the trial court is required to determine "which parent has the best parenting skills and which has the willingness and capacity to provide primary child care." *Hutchison*, 58 So.3d at 48.

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." Because the trial court did not determine which parent had the best capacity to provide primary child care, the custody order ignored a major component of the legal determination required by *Albright* and further ignores the great wealth of evidence presented at trial. Further, it ignores the trial court's own finding.

Regarding the continuity of care factor, the trial court correctly ruled in favor of Sharon, finding that she had "basically been a stay-at-home mom with the children." Sharon testified that during the marriage she was Santa and the tooth fairy for the children, that she took them to the doctor, and that she handled the majority of the child care. After the separation, she worked as a nanny and could continue to parent the boys at her job.

In contrast, 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. Even though the guardian ad litem warned against Allen trying to replace Sharon, four of the babysitters were women. While Sharon had formerly bought Christmas presents for the boys, in one bizarre post-separation even Allen apparently had not bought toys for his children, even by Christmas Eve, and had to rely on one of the babysitters to do so. Jerry Duckworth detailed on the stand that she was actually the person who had purchased the majority of the children's toys and even had to go and purchase stocking stuffers and batteries on Christmas Eve. She described how Allen had told her if stores were not open in their community on Christmas Eve, then there were "truck stops" in Hattiesburg where she could find toys.

Allen further admitted working long hours and Sharon testified that when the boys were younger he worked from sun up to sun down. In contrast, after the separation she worked as a nanny, and could remain the primary caregiver for her boys that she had been all their life.

The clear wealth of evidence presented at trial was that Sharon was the *actual* caregiver of the boys, especially in light of the court's own finding that she was a stay-at-home mom. While both parents may have had the *willingness* to be a parent to the children, Sharon was the one with the actual skills and capacity to do so.

Accordingly, the trial court erred in assessing this factor as neutral between the parents, as it should have been rendered in favor of Sharon.

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*, 58 So.3d at 48. 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).[3]

Yet the trial court did not make the determination that if the children would necessarily have to move schools if Sharon had primary physical custody of the boys, or shared physical custody with Allen. The inference from the court's heavy emphasis on the school district ruling is that the trial court felt that if the children had to move school districts it would impact them negatively. Yet there was no evidence presented that they 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.

Further, the trial judge improperly focused *only* on that component of this three-part factor. *Albright* clearly requires a trial court to weigh "the home, school, and community record of the child"—but the trial judge found the school district component radically outweighed the rest of the analysis. This is not in accord with precedent, nor was it based on facts presented at trial.

Because this factor was improperly weighed in favor of the father, the custody order must be reversed.

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[3] As will be noted in Section V below, the trial court improperly split this factor into two components.

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

Because the trial court improperly fractured an *Albright* factor into two parts, the custody order is fatally flawed and must be vacated.

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 carved a separate factor from the school record consideration of *Albright*.

While many of the trial court's *Albright* rulings barely reach one sentence, under the "other" heading its scrutiny spanned two pages. R.E. 16-17. Under this "other" factor, the trial court determined that "[t]he oldest child, according to the testimony presented, needs tutoring to maintain his excellent grades," a conclusion hotly disputed at trial. R.E. 16. The trial court went on to determine that Sharon did not meet this hypothetical standard, and so weighed the favor "strongly" in favor of Allen, tipping the *Albright* analysis in his favor.

First, this alleged "other" factor dealing with Charlie's academic performance is very clearly a component of the "the home, school, and community record of the child." As such, it was legal error for the trial court to fail to include it under that factor and analyze it properly. Like the "age" component addressed in Section II above, the trial court improperly split an *Albright* factor, resulting in a custody determination in favor of the father.

Second, there was no factual basis for the trial court's ruling that this alleged factor weighed in favor of Allen. The testimony at trial was undisputed that the couple's oldest son, Charlie, was a student in the gifted program at his school. All parties agreed that he made all A's and the occasional B. His second grade teacher testified she had been tutoring him after school, but the teacher was also one of Allen's five babysitters for the boys after the separation. Sharon testified that she did not know that Charlie was being tutored and did not believe he needed tutoring because of his excellent grades and participation in the school's gifted program. She

testified that she thought the "tutoring" was simply more babysitting for the boys and that all Charlie did with his tutor was play computer games. Further, she testified that she "had no idea that he was to be tutored through the summer." There was evidence that the school would not test Charlie for learning disabilities because he was making such high grades.

Further, while the trial court condemned Sharon for not having the child tutored every day—which she swore under oath that she did not believe he needed—Allen admitted that he did not have Charlie tutored every day either. Instead, he testified that sometimes "[h]e may have missed a few days, a few Fridays we may have goofed off if he was up to speed." Allen testified that he thought Charlie was "really smart."

For her part, the tutor repeatedly changed her story on the stand that Charlie needed to be tutored. First, she stated that Charlie needed "everyday" tutoring, but she admitted she only worked with him "either two or three times a week." The second grade teacher then admitted he *did not* need tutoring five days a week, but probably three to four days a week. She later changed her story again that tutoring was warranted three days one week and two the next was probably adequate.

Further, even though there was some discussion of whether Charlie had dyslexia or dyslexic symptoms, even Allen conceded that Charlie had not been tested for dyslexia. The key reason he had not been tested was because he was performing so well academically.

The trial court spilled much ink addressing Charlie's alleged need for tutoring and condemning Sharon for failing to have him tutored, but there was evidence that his "tutoring" was just more babysitting time because Allen could not provide primary care for his children. This "other" factor was improperly carved from another *Albright* factor, was strongly disputed at trial, and in no event should weigh so heavily in Allen's favor that it unbalances the entirety of the *Albright* analysis.

Because the trial court improperly created a new factor that is actually a component of a separate *Albright* consideration, it committed legal error, and must be reversed. Secondly, because the trial court improperly weighed the facts before it the custody order must be vacated.

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 12th day of July, 2011,

Respectfully Submitted,
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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:

Ms. Kathy Gillis, Clerk
(via Hand Delivery)
MISSISSIPPI SUPREME COURT
P.O. Box 117
Jackson, Miss. 39205

Kate Eidt
418 Yazoo Street
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The Honorable J. Larry Buffington
Special Chancellor
101 Dogwood Avenue
Collins, Miss. 39428

THIS, the 12th day of July, 2011.

DAVID NEIL McCARTY, ESQ.