IN THE SUPREME COURT OF MISSISSIPPI

JONATHAN P. O'BRIANT **APPELLANT**

VS. **CAUSE NO. 2011-CA-00732**

OLIVIA A. O'BRIANT **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF FOR APPELLANT

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.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.

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STATEMENT OF ISSUES

I. Whether the Chancery Court erred in its application of the *Albright* factors in awarding custody of the minor child to Olivia O'Briant.

II. Whether the Chancery Court erred in not granting Jonathan O'Briant's Motion for Rehearing and To Alter and Amend Judgment, Supplemental Motion for Rehearing and to Alter and Amend Judgment, and Second Supplemental Motion for Rehearing and to Alter and Amend Judgment.

STATEMENT OF CASE

A. Procedural History

Jonathan O'Briant ("Jonathan") filed a Petition for Divorce and Other Relief against Olivia O'Briant ("Olivia") in the Chancery Court of Madison County on August 28, 2009. Olivia obtained a Temporary Restraining Order against Jonathan in Texas on August 21, 2009. Subsequently, Jonathan petitioned and was granted an Emergency Temporary Restraining Order by the Chancery Court on September 1, 2009. Such Order granted Jonathan sole physical and legal custody of the minor child namely, Maguire O'Briant ("Maguire") because Olivia had wrongfully taken the child out of state and refused to bring him back. (R.E. 4). The Texas action was later dismissed and the parties entered into an Agreed Preliminary Injunction on September 10, 2009, which alternated custody of Maguire until the temporary hearing held on October 15, 2009. At the temporary hearing, the Chancery Court awarded Jonathan temporary sole physical and legal custody of Maguire subject to the visitation of Olivia. The case was set for a two-day trial on the merits beginning on August 31, 2010. At the commencing of the trial before Chancellor Brewer of the Madison County Chancery Court, the parties entered a Joint Consent to Divorce on the Grounds of Irreconcilable Differences and to Trial of Contested Issues on August 31, 2010.

On October 15, 2010, the Chancery Court of Madison County entered its Opinion and Final Judgment, whereby the parties herein were granted a divorce and Olivia was awarded sole physical custody of the minor child subject to Jonathan's visitation. (R.E. 12). In addition, the parties were awarded joint legal custody of the minor child and

Jonathan was ordered to pay unto Olivia monthly child support in the amount of two hundred and fifty dollars ($250.00). (R.E. 13).

On October 25, 2010, Jonathan filed his Motion for Rehearing and to Alter and Amend Judgment requesting the Chancery Court to reconsider its application of the *Albright* factors and award of sole physical custody to Olivia. (R.E. 14). On January 31, 2011, Jonathan filed his Supplemental Motion for Rehearing and to Alter and Amend Judgment based on newly discovered evidence not previously available at trial. (R.E. 27). On April 28, 2011, Jonathan filed his Second Supplemental Motion for Rehearing and to Alter and Amend Judgment. Olivia did not respond to either motion. (R.E. 35). Said Motions were heard by the Chancery Court on March 23, 2011. On May 20, 2011, the Chancellor issued an Order Denying Jonathan's Motion for Rehearing and to Alter and Amend Judgment and Supplemental Motion for Rehearing and to Alter and Amend Judgment without providing any basis for the Chancery Court's denial. (R.E. 41). On May 25, 2011, Jonathan timely filed his Notice of Appeal to this honorable Court. (R.E. 42).

B. Statement of Facts

Jonathan and Olivia O'Briant were married on August 13, 2004. (R.E. 3). One child was born of this marriage namely, Maguire, born June 23, 2007. (R.E. 3). Maguire was born extremely premature, and therefore, continues to have significant medical concerns. (R.E. 3, 5). Jonathan, Olivia and Maguire moved into the martial home, owned by Jonathan's mother, Ann Necaise ("Ann"), located in Ridgeland, Mississippi. (R.E. 3). Ann resided in the home next door with her mother. On or about August 14, 2009, Olivia left the marital home with Maguire to move in with her parents, Bob and

Alison Piantanida, in Whitehouse, Texas. (R.E. 3). Olivia obtained a temporary restraining order against Jonathan on August 21, 2009 in Texas, which was later dismissed. Jonathan moved for an Emergency Temporary Restraining Order in the Chancery Court of Madison County because Olivia wrongfully took Maguire to Texas and refused to bring him back, and thus, was granted sole physical and legal custody of Maguire. (R.E. 4). Jonathan maintained sole custody of Maguire until Olivia was awarded sole physical custody on October 15, 2010 by the Chancery Court. (R.E. 12). Jonathan perfected his appeal to this honorable Court aggrieved by the Chancery Court's award of custody to Olivia and denial of his subsequent motions requesting reconsideration its decision and a rehearing based on newly discovered evidence not previously available at the trial. (R.E. 14, 27, 35, 41).

Jonathan continues his employment with the Department of Rehabilitation Services as a Disability Determination Specialist and currently resides in the former marital home. Olivia works as a bank teller at Southside Bank in Tyler, Texas and resides with her parents in Whitehouse, Texas.

SUMMARY OF ARGUMENT

This appeal stems from a ruling by the Chancery Court of Madison County awarding Olivia sole physical custody of Maguire subject to Jonathan's visitation. (R.E. 12). This Chancery Court's decision was not appealed because Jonathan disagreed with the conclusion of the evidence, but because the Chancery Court (i) drew a conclusion without real evidence supporting her determination; (ii) applied an erroneous legal standard during its analysis of the *Albright* factors recasting the *Albright* factors; and (iii) denied Jonathan's requests for rehearing to present newly discovered evidence in the best interest of the child.

As discussed below, the Chancery Court did not properly consider the evidence presented with regard to the *Albright* factors concerning the stability of the home environment and employment of each parent; the continuity of care; parenting skills; the willingness and capacity to provide primary child care; and physical and mental health of each parent. Not only did the chancellor apply an erroneous legal standard, but she reached the ultimate custody decision that is not supported by the record of evidence. Thus, the Chancery Court abused her discretion by stripping away Jonathan's custody of Maguire without substantial evidence supporting its award of custody to Olivia.

Moreover, the Chancery Court also erred in denying Jonathan's request for rehearing and to alter and amend the judgment to reconsider its misapplication of the *Albright* factors and conclusion unsupported by the record, as well as present newly discovered evidence. (R.E. 41). This newly discovered evidence concerned Olivia's reckless disregard to meet the medical needs of the child, unwillingness to co-parent

and intentional interference with his pursuit of a nurturing, healthy relationship with Maguire, which was not available at trial and is material to the Chancery Court's custody determination of what is in the best interest of the child. (R.E 27-40); *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss. 1994). The Chancery Court prohibited Jonathan from presenting newly discovered evidence regarding Olivia's failure to properly care for the minor child, and thus ignored its duty to do what is in the best interest of the child.

In pertinent part, Rule 59(a)(2) of the Mississippi Rules of Civil Procedure provides that a chancellor may "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings of fact and conclusions, and direct the entry of a new judgment." A new trial may be granted if the following requirements are met: (1) the evidence is discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is material and not cumulative or impeaching; and lastly (4) the evidence is such that a new trial would probably produce a new result. *Wade v. Wade*, 967 So. 2d 682, 684 (Miss. Ct. App. 2007). This Court should find that the Chancery Court abused her discretion because Jonathan has met all the required elements necessary for a new trial and can prove that the evidence was discovered following the trial; that he used due diligence to discover such new evidence; that the evidence is material to the Chancery Court's ultimate custody decision; and that if presented, a new trial would produce a new result.

Ultimately, the Chancery Court was given ample opportunity to correct its improper conclusion and erroneous application of the *Albright* factors and decline to allow newly discovered evidence not available at the hearing to be presented, but it

failed to do so without any explanation for its denial. (R.E. 41). Previously, Mississippi courts have held that where a chancellor provides no explanation for denial of the requested relief, the case should be remanded for an explanation of such denial. *See Chroniger v. Chroniger*, 914 So. 2d 311, 316 (Miss. Ct. App. 2005). For the reasons stated herein, this Court should find that the chancellor committed reversible error and remand this case to the Chancery Court for a new trial, where a new analysis of the *Albright* factors using the appropriate legal standard shall take place.

ARGUMENT

I. Standard of Review.

The standard of review for domestic matters is abuse of discretion. Thus this 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. *Taylor v. Taylor*, 909 So. 2d 1280, 1281 (Miss. Ct. App. 2005). As stated in *Hollon v. Hollon*, "where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error." 784 So. 2d 943, 946 (Miss. 2001). Further, this Court should also apply the standard of abuse of discretion when reviewing a "chancellor's denial of a motion to reconsider or a motion for a new trial." *See Wade*, 967 So. 2d at 684. In the present case, because the chancellor erroneously applied the *Albright* factors, was manifestly wrong in her conclusion, and erred in denying Jonathan's motion for rehearing, this Court should apply the abuse of discretion standard of review.

II. The Chancery Court erroneously applied the *Albright* factors and reached a conclusion not supported by the record of evidence presented and thus, erred in awarding custody of the minor child to Olivia.

"In all child custody cases, the polestar consideration is the best interest of the child." *Sellers,* 638 So. 2d at 485. "The *Albright* factors, used to determine child custody based on the best interest of the child, include: 1) age, health and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) age, physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community

record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship." *Sellers*, 638 So. 2d at 485; *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

In determining whether the chancellor improperly applied the *Albright* factors, all testimony and evidence presented at trial under each factor should be reviewed. *See Watts v. Watts*, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). In this case, the Chancery Court misapplied the *Albright* factors regarding the stability of the home environment and employment of each parent; the continuity of care; parenting skills; the willingness and capacity to provide primary child care; and physical and mental health of each parent, and reached a conclusion that is not supported by the record of evidence. Due to the Chancery Court's improper consideration of the evidence actually presented in this case and subsequent erroneous application of the *Albright* factors, this Court should find that the chancellor committed reversible error and remand this case to Chancery Court for a new trial, where the Chancery Court shall conduct a proper analysis of the *Albright* factors. *Hollon*, 784 So. 2d at 946. As such a discussion of these factors is stated below.

A. Stability of the Home Environment and Employment of Each Parent

The first instance of the Chancery Court's application of an erroneous legal standard begins with its recasting of the stability of home environment and employment of each parent *Albright* factor into two separate factors. (R.E. 6, 8-9) The Chancery Court correctly found that Jonathan's employment is more stable with his flexible schedule, lack of travel requirements and adequate compensation. (R.E. 6). However, when the Chancery Court analyzed the stability of the home environment separately, it

misapplied the *Albright factors*, which resulted in the wrong conclusion. *Sellers*, 638 So. 2d at 485. By removing "stability of home environment" out of *Albright's* "stability of home environment and employment of each parent" factor and analyzing them separately, the Chancery Court scored such factor as favoring neither parent. By way of analogy, a baseball team gets three outs each inning. It is not appropriate to give a team four outs in one inning and only two in the next, even though six outs would have been received in two innings. The Chancery Court's erroneous application of the *Albright* factors was raised in Jonathan's request for rehearing and to alter and amend the Judgment, but the Chancery Court failed to correct its mistake. (R.E. 41). If the Chancery Court had properly applied the legal standard as enumerated in *Albright*, then this factor should have been found to favor Jonathan.[1]

Because the Chancery Court recast the *Albright factors*, in doing so, it also reached a wrong conclusion. In a recent unpublished case, the Mississippi Court of Appeals found that the evidence did not support the chancellor's finding that the father's home was more stable than the mother's. *Smullins v. Smullins*, No. 2009-CA-00994-COA (¶ 32) (Miss. Ct. App. 2011). The Court found that there was no evidence in the record to show that the mother's home was unstable. *Id.* Further, the Court found that the "chancellor's reasoning on this point [was] not supported by the evidence." *Id.*

In the present case, the record revealed that since the day Maguire was brought home from the hospital, Maguire lived in the martial home, where Jonathan still resides. (R.E. 8) Jonathan provides a stable home where Maguire feels comfortable and is surrounded by family, church, school, doctors and friends that care for Maguire. (R.E.

[1] Jonathan would show that the stability of home environment favors him, even if considered alone. Maguire lived with Jonathan at 7063 Edgewater Drive in Ridgeland, Mississippi since the day he came home from the hospital until the divorce. Olivia currently resides in Whitehouse, Texas with her parents.

8). Just as in *Smullins*, there is no evidence in the record of the present case to show that Jonathan does not provide a stable environment for the child. *Smullins*, No. 2009-CA-00994-COA at ¶ 32. Further, in Mississippi, numerous cases support the finding that the parent remaining in the marital home is a factor which weighs in favor of the stability of the home environment. *Woodham v. Woodham*, 17 So. 3d 153, 158 (Miss. Ct. App. 2009). Thus, the Chancery Court used an erroneous legal standard when it recast two of the *Albright* factors in an unauthorized manner under Mississippi law, and reached an improper conclusion. *See Hollon*, 784 So. 2d at 946. Subsequent to Jonathan's request, the Chancery Court failed to address its misapplication as requested in Jonathan's timely Motion. (R.E. 15).

B. Continuity of Care

Further, the Chancery Court failed to consider the evidence actually presented and thus, drew a conclusion that is not supported by real evidence. In reaching its determination to award Olivia custody of Maguire, the Chancery Court heavily relied on the twin findings that Jonathan provided little of Maguire's care prior to the separation, and that after the separation, Jonathan's mother, Ann, provided most of Maguire's care. (R.E. 5). In addition, the Chancery Court concluded that prior to the separation, Jonathan primarily worked outside the home or pursued his studies for medical school. (R.E. 5). However, there is no evidence in the record to support these findings. Prior to the trial, Jonathan and Olivia spent approximately the same amount of time at home with Maguire as illustrated in the table described in Jonathan's Motion for Rehearing and to Alter and Amend Judgment. (R.E. 19). At trial, both parties testified that the other was significantly involved in Maguire's rearing, but each claimed to be the parent who primarily cared for Maguire. (Trial Tr. 73, 162). The Chancery Court's conclusion is

inconsistent with the testimony that Jonathan cooked for Maguire, bathed Maguire, changed his diapers and cared for his medical needs on a daily basis. (Trial Tr. 60-62, 273.) The Chancery Court inexplicably concluded that Jonathan "did assist with bathing and some doctor's visits" in spite of Olivia's testimony that Jonathan cared for Maguire's daily needs. (R.E. 5) (Trial Tr. 241). Nevertheless, the Chancery Court's judgment failed to find that Jonathan continuously cared for Maguire, even during the months while Olivia was enrolled in school. Therefore, the Chancery Court's findings unambiguously conflict with the substantial weight of the evidence.

C. Parenting Skills

In Jonathan's initial Motion for rehearing, he requested the Chancery Court to reconsider its inaccurate analysis of the parenting skills of both parties. (R.E. 14-26); *Sellers*, 638 So. 2d 481, 485 (Miss. 1994). In its opinion, the Chancery Court concluded that because Olivia had more time to develop her parenting skills prior to the separation and because Jonathan relied heavily on his mother as a caretaker since the separation, this factor favored Olivia. (R.E. 5-6). Again, the Chancery Court incorrectly concluded that Jonathan primarily worked outside the home or pursued his studies for medical school. (R.E. 5-6). This conclusion is inaccurate for two reasons. First, the Chancery Court ignored the substantial evidence in favor of Jonathan's parenting skills. Testimony at trial revealed that Jonathan provided for the minor child's needs on a daily basis and spent an equal amount of time with the minor child. (Trial Tr. 60-62). Jonathan's mother only provided care to the minor child while Jonathan was away at work. (Trial Tr. 273).

Moreover, Mississippi courts have held that the presence of family is a reasonable consideration in analyzing the *Albright* factors. *Neville v. Neville*, 734 So. 2d 352, 355

(Miss. Ct. App. 1999); *see also Smullins*, No. 2009-CA-00994-COA at ¶ 35 (*citing Collins v. Collins*, 20 So. 3d 683, 690 (Miss. Ct. App. 2008). In *Neville*, the Court affirmed the chancellor's decision to award custody of the child to the mother because of the strong presence of family structure. 734 So. 2d at 355. Further, in *Neville*, the chancellor had also found that the presence of family would provide a measure of stability for the child. *Id.* However, in the present case, Jonathan was penalized for the presence of his mother, even though the chancellor acknowledged that in awarding Olivia custody, her family would be providing daily care to the child while Olivia was at work or school. (Trial Tr. 184). Further, the testimony presented illustrated that Jonathan is equipped with the parenting skills necessary to provide primary care to the minor child and is actively involved in his daily routine, such as feeding, bathing, changing, playing as well as caring for his medical needs. (Trial Tr. 60-62, 287). Just like the mother in *Neville*, Jonathan too has extended family that live nearby and "lend a measure of stability to the child's life." *Id.*

Second, the Chancery Court did not account for Olivia's poor parenting skills, even though it was agreed upon by both parties. (Trial Tr. 232-240). Olivia admitted to (i) not returning home from Texas when Maguire had pneumonia; (ii) not intending to enroll Maguire in speech therapy, even after his speech impediment was identified by a professional; (iii) Maguire's ear infections worsening on her watch; (iv) recommending an unproven "garlic water" remedy; and worst of all (v) intentionally withholding Maguire from Jonathan. (Trial Tr. 232-240). Again, the Chancery Court reached a conclusion without any real evidence to support such determination. *Hollon*, 784 So. 2d at 952.

D. Willingness and Capacity to Provide Primary Child Care

In a very brief analysis, the Chancery Court stated that it was apparent from Jonathan's and his mother's testimony, that Jonathan does not have much experience as the primary caregiver of Maguire and that his mother clearly assumes that role. (R.E. 6). However, this completely contradicts the actual testimony of Jonathan and Ann at trial. (Trial Tr. 60-62, 73, 273, 287, 291). Both Jonathan and Ann testified that Jonathan is the primary caregiver of Maguire and Ann only assists while Jonathan is at work. (Trial Tr. 60-62, 273), (R.E. 6). The actual testimony reveals that when Jonathan arrives home around 4:45 p.m., he is completely hands on with Maguire and takes care of his needs, including feeding, bathing, and changing as necessary. (Trial Tr. 60-62, 273). Since such conclusion was not based on substantial evidence, the Chancery Court erred in finding that this factor favored Olivia.

E. Age, Physical and Mental Health of Each Parent

The Chancery Court weighed too heavily on the evidence regarding Jonathan's three month commitment in the Mississippi State Hospital at Whitfield in June of 2000, as well as his medical records that were admitted into evidence. (Trial Tr. 86-88), (R.E. 7). As stated by counsel during oral argument before the Chancery Court,

> It is hard to see the relevance of a stay at Whitfield that was so well in advance[,] not just of the parenting but also the marriage itself. People often come into this court have had hard times, and they are judged not by what happened prior to the marriage but by what happened during the marriage and during parenting times.

(Trial Tr. 378). Moreover, there was not a single request for Jonathan to participate in an independent medical exam, a guardian ad litem to investigate, or expert testimony on any of these issues. Therefore, the Chancery Court is without any basis for how heavily it weighed on this factor.

Further, since that period, Jonathan's medical records illustrate significant improvements and stabilization. (R.E. 7). Most importantly, there was not a single piece of evidence was introduced demonstrating that Jonathan's mental health had any adverse impact on Maguire. This is because it does not exist. Jonathan is fully capable of caring for Maguire. Jonathan had sole temporary custody of Maguire at the time of the final hearing, and during such period, not one time did the issue of Jonathan's mental health arise. Instead, Jonathan proved that he was capable and willing to be the sole custodial parent of Maguire.

In *Passmore v. Passmore*, the Court held that "a parent [whom] has experienced mental or emotional problems is not a bar to custody without a showing that the parent's present ability to care for the child is affected." 820 So. 2d 747, 751 (Miss. Ct. App. 2002). In the present case, without a showing that Jonathan's mental health affected his ability to care for Maguire, the Chancery Court barred his ability to primarily care for his son. Further, in *Passmore*, the mother was awarded custody in spite of a history of serious depression and one suicide attempt, based on testimony that she was receiving counseling and taking medication and thus, the illness would not interfere with her ability to care for the children. *Id.* Therefore, the *Passmore* Court affirmed the chancellor's determination that the mother exhibited better parenting skills despite her behavior in the past which did not exactly "comport with the traditional notions of good parenting skills, including an attempted suicide and the temporary use

of alcohol and prescription drugs as sleeping aids." *Passmore*, 820 So. 2d at 752. Just as in *Passmore*, the record in the present case reveals that Jonathan receives counseling and consistently takes his medication, and thus, there is no interference with his ability to care for Maguire. *Id.*

Moreover, as previously held by this Court, prior commitment to a mental facility for depression should not weigh against a parent who has recovered from the illness. *McGraw v. McGraw*, 841 So. 2d 1181, 1184 (Miss. Ct. App. 2003). In *McGraw*, because there was no evidence in the record indicating that the mother was "physically or emotionally incapable of providing the primary care, custody, and control of the children," the Court concluded that it was in the best interests of the children to remain with their mother. *Id.* Similarly, in the present case there was nothing in the record to indicate that Jonathan was not physically or emotionally incapable of providing primary care to Maguire; and therefore, the Chancery Court inappropriately analyzed this factor against him by weighing too heavily on the evidence of Jonathan's temporary stay at Whitfield nearly ten years before the trial. *Id*; *see Passmore*, 820 So. 2d at 751; *see also Hollon*, 784 So. 2d at 952.

By applying an erroneous legal standard in its *Albright* analysis, the Chancery Court erred in its conclusion, which was unsupported by real evidence, holding that it is in the best interest of the child to award Olivia sole physical custody. Because the Chancery Court improperly applied the *Albright* factors and drew a manifestly wrong conclusion, this Court should find the chancellor committed reversible error and remand this case to Chancery Court for a new trial, where the Chancery Court shall conduct a new analysis of the *Albright* factors.

III. The Chancery Court erred by denying Jonathan's request for rehearing and to present newly discovered evidence in the best interest of the minor child.

This Court should apply the standard of abuse discretion when reviewing a chancellor's denial of a motion to reconsider or a motion for a new trial. *See Wade*, 967 So. 2d at 684. In the present case, the Chancery Court erred in denying Jonathan's Motion for Rehearing and to Alter and Amend Judgment, Supplemental Motion for Rehearing and to Alter and Amend Judgment and Second Supplemental Motion for Rehearing and to Alter and Amend Judgment to allow newly discovered evidence to be introduced at a new trial in the best interest of the minor child. Further, the Chancery Court provided no explanation for the dismissal of Jonathan's request for rehearing, which is also grounds for remand. *See Chroniger*, 914 So. 2d at 316.

In pertinent part, Rule 59(a)(2) of the Mississippi Rules of Civil Procedure provides that a chancellor may "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings of fact and conclusions, and direct the entry of a new judgment." Mississippi courts have held that a new trial may be granted if the following requirements are met: (1) the evidence is discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is material and not cumulative or impeaching; and lastly (4) the evidence is such that a new trial would probably produce a new result. *Wade*, 967 So. 2d at 684. It has also been held that in child custody cases, such as the present case before the Court, the chancellor has a duty to do what is in the best interests of the child, and therefore, any and all evidence aiding the chancellor in reaching this decision should be considered. *See Logan v. Logan*, 730 So. 2d 1124, 1126 (Miss. 1998). Due to the Chancery Court's

error in denying Jonathan's request for rehearing to introduce newly discovered evidence not available at trial, this Court should reverse the Chancery Court's decision and remand this case for a new trial, where the Chancery Court shall conduct a new *Albright* analysis using the appropriate legal standard. *Smullins*, No. 2009-CA-00994-COA (¶ 42-43) (Miss. Ct. App. 2011).

A. Newly Discovered Evidence Not Available At The Hearing

In the present case, Jonathan timely filed a Motion for Rehearing and To Alter and Amend Judgment on October 25, 2010, which was followed by a Supplemental and Second Supplemental Motion for Rehearing and to Alter and Amend Judgment on the basis of newly discovered evidence not previously available at the hearing. (R.E. 27-40). Such newly discovered evidence came in the form of Jonathan's phone record log, his sworn affidavit and testimony illustrating Olivia's inattention and lack of discretion with regard to Maguire's significant health concern, and her non-compliant attitude to follow the Chancery Court's order from the divorce. (R.E. 27-40).

In Jonathan's Motion, it was stated that since the hearing on more than 27 separate recorded occasions Jonathan called Olivia's or her family member's telephone attempting to exercise his telephonic visitation with Maguire and was unsuccessful due to Olivia's deliberate interference. (R.E. 33). That number has now multiplied. Olivia's conduct is directly in violation of the Chancery Court's order to allow Jonathan fifteen minutes of telephonic visitation with his son while he was in Olivia's custody. (R.E. 10). Jonathan would show the Chancery Court that in reference to the telephonic visitation issue, Olivia stated that he should buy Maguire an iPhone if he wants to talk to his son.

Olivia's suggestion to purchase a cell phone for their four-year old child is a pure example of her immaturity and refusal to co-parent with Jonathan (O. A. Tr. 374.)[2]

In his sworn affidavit, Jonathan stated that he was concerned about the "physical wellbeing of Maguire." (R.E. 39). Jonathan would present evidence to show that Olivia continuously fails to acknowledge and respond to Maguire's recurrent health issues. (R.E. 27). The testimony presented at trial discussed in depth, Maguire's significant health concerns which date back to his premature birth, however, Olivia continues to act in oblivion with regard to Maguire's medical needs. (Trial Tr. 232-240).

On numerous occasions the same pattern arose: Maguire would tell Jonathan on the phone that he was not feeling well, Olivia would fail to act, Jonathan would take Maguire to the doctor as soon as he picked him up from a scheduled visitation and doctors would find that Maguire needed significant medical care such as, treatment for his upper respiratory infections, sinus infection, ear infections, placement of new tubes in his ears, a micro laryngoscopy to examine his larynx and a severely infected ingrown toenail. (R.E. 27, 39). Had Olivia taken reasonable precaution when Maguire was in her care, these diagnoses could have been prevented. However, in response to Maguire's continued health concerns, Olivia blames Jonathan and the state of Mississippi for his sickness. Jonathan would show the Chancery Court that Olivia stated in her text message to Jonathan that "...hopefully the doctors will find out why he keeps getting sick in Mississippi." (R.E. 30).

Further, since the hearing, Olivia has increased Maguire's time at the daycare, which completely inconsistent with her testimony at the hearing that Maguire would be

[2] "O. A. Tr." refers to the transcript of the oral argument before the Chancery Court on March 23, 2011 on Jonathan's Motion for Rehearing and to Alter and Amend Judgment and Supplemental Motion for Rehearing and to Alter and Amend Judgment.

watched at home by her family members. (Trial Tr. 184). Evidence was presented that if Maguire was in Jonathan's custody, Maguire would be cared for by Jonathan's mother while he was at work. (Trial Tr. 273). In addition, Olivia has not started attending nursing school as the Chancery Court was lead to believe she would do beginning in January, 2011. (Trial Tr. 160). This is another of many examples of Olivia leading the Court to believe one thing and doing the opposite.

B. Jonathan Used Due Diligence to Discover Newly Discovered Evidence

Jonathan was diligent in his efforts to discover the new evidence as discussed above. The newly discovered evidence surrounds events that occurred after the trial, and thus could have only been discovered after the trial. Therefore, Jonathan's due diligence to discover the newly discovered evidence should be inferred. *See Wade*, 967 So. 2d at 684. Even opposing counsel admitted during oral arguments before the Chancery Court on Jonathan's Motion and Supplemental Motion for Rehearing, that he did not have proof that Jonathan failed to use diligent efforts. (O.A. Tr. 383).

C. Newly Discovered Evidence is Material to the Chancery Court's Albright Analysis

This newly discovered evidence is material because it goes directly to the best interest of the child, which is the polestar consideration in a custody determination. *Sellers*, 638 So. 2d at 485. In the present case, the new evidence was discovered after the trial; and therefore, never heard by the Chancery Court. The evidence supports a finding that Olivia is not the proper custodial parent and that awarding Jonathan primary physical custody is in the best interest of Maguire. Additionally, the evidence is

not impeaching or cumulative in nature, but is material to the chancellor's determination of custody and analysis of the *Albright* factors.

D. If the Court Should Grant a New Trial, a New Decision Would Result

In order to proceed on a motion for new trial based upon newly discovered evidenced, "the evidence [must be] such that a new trial would probably produce a new result." *See January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992). If Jonathan were granted the opportunity to present the newly discovered evidence at a new hearing, the Chancery Court would undoubtedly reach a new result in their analysis of the *Albright* factors and award Jonathan primary custody of Maguire.

In a recent unpublished case, the Court of Appeals determined that the chancellor should have taken new evidence under review to determine what would be in the best interests of the child. *Smullins*, No. 2009-CA-00994-COA at ¶ 41. In *Smullins*, the chancellor refused to hear the newly discovered DNA evidence. Ultimately, the Court found that the chancellor committed error by denying the mother's motion to reconsider or, alternatively, a new trial and directed the chancellor to conduct a new *Albright* analysis to determine the best interest of the child. *Id.* at ¶ 42.

The newly discovered evidence demonstrates Olivia's lack of parenting skills and willingness and capacity to care for Maguire. The new evidence also shows Olivia's unwillingness to co-parent with Jonathan and her intentional interference with his pursuit of nurturing a healthy relationship with Maguire. With a proper analysis of the *Albright* factors, the Chancery Court would reach the following conclusion regarding the *Albright* factors: the age, health and sex of the child is neutral; continuity of care prior to the separation is neutral; best parenting skills favors Jonathan; willingness and

capacity to provide primary child care favors Jonathan; the employment of the parent and responsibilities of that employment favors Jonathan; age, physical and mental health and age of the parents favors neither party; emotional ties of parent and child favors neither parent; moral fitness of parents favors neither party; the home, school and community record of the child favors Jonathan; the preference of the child at the age sufficient to express a preference by law is not applicable; stability of home environment and employment of each parent favors Jonathan; and other factors relevant to the parent-child relationship favors neither party. *See Hollon*, 784 So. 2d at 946. Therefore, if Jonathan was granted a new trial, the newly discovered evidence would be material to the Chancery Court's *Albright* analysis and would produce a new result in awarding Jonathan primary physical custody of Maguire.

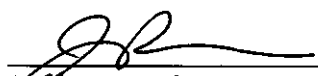
In conclusion, this Court should find that the Chancery Court abused her discretion because Jonathan has met all the required elements necessary for a new trial as follows, the evidence was discovered following the trial; Jonathan used due diligence to discover such evidence; the evidence is material to the Chancery Court's ultimate custody decision; and if presented, a new trial would produce a new result. *Wade,* 967 So. 2d at 684. Therefore, this Court should find the chancellor committed reversible error and remand this case to Chancery Court for a new trial, where the Chancery Court shall conduct a new analysis of the *Albright* factors applying the proper legal standard.

CONCLUSION

In conclusion, this appeal stems from the custody determination of an honorable chancellor with vast experience and ability in her application of the law and analysis. However, in this case, the chancellor failed to reconsider her erroneous application of the *Albright* factors and her conclusion lacking support from the record of evidence. Further, the Chancery Court denied Jonathan the opportunity to present newly discovered evidence not available at the trial aiming at the heart of her decision to award Olivia custody of Maguire in his best interest, and did so without providing a single explanation for her denial despite the fact that very specific issues were raised by the Petitioner. If the Chancery Court would have granted a rehearing and conducted a new analysis of the *Albright* factors applying the proper legal standard, then it would determine that it is in Maguire's best interest to award Jonathan custody of his son. For the reasons stated herein, this Court should find that the chancellor committed reversible error and remand this case to the Chancery Court for a new trial, where a new analysis of the *Albright* factors using the appropriate legal standard shall take place.

Respectfully submitted, this the 10th day of November, 2011.

JONATHAN P. O'BRIANT

By: 

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CERTIFICATE OF SERVICE

I, Jeffrey B. Rimes, Attorney for the Appellant, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

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Honorable Cynthia Brewer
Madison County Chancery Court
P.O. Box 404
Canton, Mississippi 39181

This the 10th day of November, 2011.

JEFFREY B. RIMES

ADDENDUM

Mississippi Rules of Civil Procedure 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the court of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.