

IN THE SUPREME COURT OF MISSISSIPPI

KIMBERLY ANNE COLLINS

APPELLANT

VS.

CASE NO. 2011-^{CA}TS-01307

ROBERT JARRAD COLLINS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(b) of the Mississippi Rules of Appellate Procedure, 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 Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Michael Malski, Chancellor
2. Robert Jarrad Collins Appellee
3. William R. Ford, Esq., Attorney for the Appellee
4. Kimberly Anne Collins, Appellant
5. M. Craig Robertson, Esq., Attorney for the Appellant
6. Jeremy P. McNinch, Esq., Attorney for the Appellant
7. Matthew S. Easterling, Esq., Attorney for the Appellant

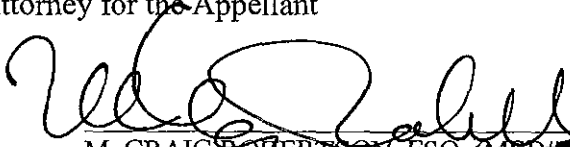

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STATEMENT OF THE ISSUES

1. This Honorable Court should reverse and render sole custody to Appellant because the trial court committed manifest error by incorrectly applying the *Albright* factors by placing undue weight on the moral fitness of the Appellant, or in the alternative, reverse and render joint physical custody to the parties, and for either determination, this Court should remand with instructions regarding the custody and visitation schedule.

SUMMARY OF THE ARGUMENT

Kim now comes before this Honorable Court and prays that it reverse the trial court's decision. Kim was forthcoming about the adulterous relationship with Austin Haley ("Haley") throughout the trial proceedings. Yet, it is obvious that Kim wrongfully received punitive treatment concerning custody, because she had an affair. In child custody cases the polestar consideration is the best interest and welfare of a child, *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983), but where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error." *Hollon v. Hollon*, No. 2000-CA-00141-SCT (¶ 11) (Miss. 2001) (emphasis added).

Kim submits that her assignments of error are more than factual disputes as Jarrad contends in his Brief. Although the trial court discussed the *Albright* factors when determining Connor's custody, it committed error by placing undue weight on one factor – Kim's moral fitness. The trial court colored all aspects of its discussion based upon Kim's extramarital relationship. Jarrad's own Brief focuses solely on Kim's affair. However, there was no evidence to suggest that Kim's relationship with Haley affected Connor in any way and the trial court did not sufficiently consider Jarrad's one-night-stand and other immoral behavior when making its custody determination.

Therefore, the trial court erred in awarding primary physical custody to Jarrad due to its improper consideration of Kim's moral fitness. Kim prays this Honorable Court reverse and render sole custody of Connor to her, or alternatively, reverse and render Kim and Jarrad joint physical custody of Connor. Based on this Honorable Court's decision, Kim requests this Court remand with instructions to the trial court regarding the custody and visitation schedule.

ARGUMENT

I. THE TRIAL COURT ERRED BY PLACING UNDUE WEIGHT ON KIM'S MORAL FITNESS WHEN DETERMINING CUSTODY WITHOUT CONSIDERING JARRAD'S OWN MORAL FAULT OR EVIDENCE THAT KIM'S BEHAVIOR HAD NO NEGATIVE IMPACT ON CONNOR.

By placing excessive weight on Kim's moral fitness, the trial court was manifestly wrong in awarding primary physical custody of Connor to Jarrad. It is well established in Mississippi that "[m]arital fault should **NOT** be used as a sanction in custody awards. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983) (emphasis added). Although *Albright's* analysis of a parent's moral fitness encompasses adultery, it is but *one* factor to be considered. *Carr v. Carr*, 480 So. 2d 1120, 1123 (Miss. 1985) (emphasis added). Mississippi case law establishes that it is often in the best interest of a child to remain with his mother even though she may have been guilty of a marital transgression. See *Cheek v. Ricker*, 431 So. 2d 1139, 1144-45 n. 3 (Miss.1983) (citations omitted).

After a lengthy discussion of Kim's moral fitness in its opinion and upon a review of the trial transcript, it is easy to determine that Kim's moral fitness "took up the lion's share of [the trial court's] attention." *Hollon*, No. 2000-CA-00141-SCT ¶ 23. Unlike its analysis regarding Jarrad's behavior, the trial court revealed its intolerance for Kim's fault with its condemnatory language that her behavior "transcends irrational infatuation." (Mem. Op. and J. at 5 and; R.E. 7.) The court's bias again came by stating "the court would question the future impact of her actions on Connor's life." (Tr. 263; R.E. 83) Not only was the Court speculating, it sanctioned Kim for what was obviously thought to be the only factor meriting consideration. When re-examining the physical and mental health of Kim and Jarrad, the trial court once again pointed out Kim's extramarital behavior by stating: "Kim's excessive use of the telephone and her reaction to the lack of contact with Haley would appear to the court to be somewhat obsessive and immature." (Tr. 266; R.E. 84.), while dismissing Jarrad's use of prescription drugs for his emotional state.

Jarrad points to *Jones v. Jones* in support of Kim's high volume of messages and phone calls between her and Haley. No. 2008-CA-00035-COA (Miss. App. Ct. 2009). However, the *Jones* court was concerned with the mother's excessive use of the Internet to meet other men as well as the mother taking her child with her to meet the men she met through the Internet. *Id.* ¶¶ 11-12. The majority of Kim's telephone communication with Haley occurred during Connor's nap hours or in the evening while Connor was asleep. (Tr. 76; R.E. 57.) Some of the communication was also business related. (Tr. 234; R.E. 70.) Most importantly, Kim never took Connor to meet Haley. (Tr. 105.) While Kim acknowledged limited out-of-town meetings with Haley, she denied having him as a visitor in her home. (Tr. 93, 96; R.E. 61, 63.)

Indeed, the majority of Jarrad's Brief focuses solely on the facts surrounding Kim's relationship with Haley. *See* Brief of Appellee at 2-12. Jarrad states that Kim's trips to Ridgeland increased during their marriage. *See* Brief of Appellee at 4. However, Jarrad fails to point out to this Honorable Court that the Ridgeland Tourism Commission is one of Kim's business clients, or that Kim's parents live in Brandon, Mississippi, which is located near Ridgeland, Mississippi. (Tr. 57; R.E. 40.) Jarrad declares that Haley is an alcoholic, when in fact Haley has been sober for 23 years. (Brief of Appellee at 5; Tr. 76, 268; R.E. 57, 86.)

Jarrad also misleads this Honorable Court in stating that Kim wants to move to Nashville and marry Haley. *See* Brief of Appellee at 4. Once again, Jarrad fails to consider Kim's business client, The Natchez Trace, which begins in Nashville or that her sister resides in Nashville. (Tr. 57; R.E. 40.) Kim remains in Tupelo, Mississippi for Connor and to grow her business and firmly stated to the trial court that she has no plans to move. (Tr. 234-35; R.E. 70-71.)

Kim re-submits to this Honorable Court the holding by Mississippi Supreme Court in *Brekeen v. Brekeen*, in which the Court reversed the chancellor because he placed too much weight upon the mother's adulterous behavior. No. 2002-CA-01136-SCT (¶ 20) (Miss. 2004).

The Court found that the chancellor had “sanctioned” the wife by denying her custody of her child, and the chancellor’s decision was “woefully inconsistent” since the wife exhibited “good parenting skills” and “had the capacity to provide for the care of the minor child.” *Id.* ¶¶ 18, 20.

Likewise, the trial court in the instant case noted:

Kim clearly wants the responsibility of raising Connor. There is no question about that. And the court did say that there was **no objective proof that her behavior impacted Connor**, although the court would question the future impact of her actions on Connor’s life. (Tr. 263; R.E. 83) (emphasis added).

But later in its discussion, the trial court harshly and unfairly stated:

While Jarrad is certainly not blameless in this case, his behaviors reveal a less of a willingness to jeopardize his marriage or his relationship with his son. The court is of the opinion that Kim’s behaviors do. Kim’s two-year-long affair and her emphasis on activities that **do not reflect an ongoing commitment to the family, reveal a questionable set of priorities**. (Tr. 270; R.E. 87) (emphasis added.)

The trial court’s and Jarrad’s declarations are unwarranted and punitive. Kim is highly committed to Connor and her relationship with Haley has had no impact on Connor’s well-being. Kim never left the home without staying in contact with Connor, and she always made childcare arrangements the times she did travel. (Tr. 57-60; R.E. 40-43.) As a stay-at-home mom working from home, Kim has no plans on leaving Tupelo. (Tr. 234-35; R.E. 70-71.) Therefore, Kim submits the trial court placed the heaviest weight on only one factor – Kim’s affair – when determining child custody. The best interest of Connor dictates that this Honorable Court reverse and grant Kim sole custody, or in the alternative, grant the parties joint physical custody, giving its instructions to the trial court for the schedule of contact with Connor.

A. The trial court erred by not considering Jarrad’s own moral fitness before determining custody.

Throughout its discussion of moral fitness, the trial court did not speak to Jarrad’s own moral fault. Kim admits it was poorly developed in evidence, but largely due to the insufficient showing of evidence by Kim’s former counsel who had cancer and passed away after trial. (Tr.

254; R.E. 78.) Kim's former counsel only called two witnesses in light of the seven that testified on Jarrad's behalf. Without considering Jarrad's own behavior, the trial court could not properly balance the *Albright's* factors.

In the case at hand, Kim was completely forward regarding her relationship with Haley to the trial court. She acknowledged it was wrong, but this choice should not be the only source for determining Connor's physical custody. Jarrad admitted his own adultery after being called as a witness at trial. (Tr. 231; R. E. 69.) He participated in a one-night stand during his marriage to Kim, which is an equal or greater showing of poor judgment. (Tr. 231; R.E. 69.) Even though the trial court was made aware of Jarrad's adultery, it once again focused on Kim's behavior. It stated that Kim's relationship with Haley "was somewhat different than an isolated one-night stand." (Tr. 267-68; R.E. 85-86.)

Jarrad contends that *Woodham v. Woodham* is similar to the instant case. No. 2007-CA-01940-COA (Miss. App. Ct. 2009). The *Woodham* court found that *Albright's* moral fitness factor favored the father due to the mother exposing their child to her paramour and allowed the child to climb into bed with them. *Id.* ¶ 14. Once again, Kim has never exposed Connor to her relationship with Haley, much less to the extent as discussed in *Woodham*.

The *Woodham* court also found the physical and mental health factors favored the father after learning of the mother's "poor judgment in combining alcohol with anti-depressants." *Id.* ¶ 14. Jarrad admitted that drinking was a regular part of his life. (Tr. 13; R.E. 28.) He admitted to drinking alcohol around Connor and keeps a full liquor cabinet in his own home. (Tr. 228, *see* Ex. 12; R.E. 66.) As seen in *Woodham*, Jarrad also consumes alcohol under the influence of mood-altering medication. (Tr. 13; R.E. 28.) He is prescribed to take three different types of drugs on a daily basis, two of which are for conditions of his emotional state. (Tr. 3-4; R.E. 20-21.) Kim takes no prescription medication. (Tr. 70; R.E. 51.) Jarrad also admitted to smoking marijuana and

gambling family money on sporting events. (Tr. 6-7, 229-230; R.E. 22-23, 67-68.) He exposed Connor to this behavior outside and inside his home. These deliberate actions and illegal behaviors should have been evaluated under *Albright's* moral fitness factor. Kim respectfully submits the trial court did not consider Jarrad's own moral fitness and did not properly balance the *Albright's* factors.

B. Kim's marital fault has not harmed or negatively affected Connor.

Again in *Hollon*, the Mississippi Supreme Court recognized that in divorce actions "sexual misconduct on the part of the wife is not per se grounds for denial of custody." No. 2000-CA-00141-SCT ¶ 25. The *Hollon* Court noted the trial court never found the mother unfit to care for the minor child and no evidence was presented regarding any detrimental effects the child may have suffered as a result of living with his mother. *Id.* (emphasis added).

Unlike *Hollon*, *Myers v. Myers* is distinguishable from the instant case. No. 2001-CA-00318-COA (Miss. App. Ct. 2002). The court focused on the children's "unruly and out of control" behavior and "unexplained absences from school" while living with their mother as opposed to being "well behaved" and in "good health" with their father. *Id.* ¶ 4. Connor, on the other hand, continues to be in good health and exhibited no behavioral problems due to Kim's extramarital affair. Kim fed Connor breakfast, dressed him for school, picked him up in the afternoon, fed him lunch, prepared his supper, bought his clothes, took him to choir practice, and made all of his doctor's appointments. (Tr. 25, 60-63, 68; R.E. 35, 43-44, 50.)

If anything, Jarrad's smoking habits are harmful to Connor's health. Connor had not been diagnosed with asthma due to his age, but may be "headed that way" in the future. (Tr. 64-65; R.E. 47-48.) In addition to his breathing machine, Connor is prescribed Singulair and Clarinex. (Tr. 65; R.E. 48.) The trial court even recognized the problems associated with smoking and admitted that it should have mentioned Jarrad's smoking habits as a factor negatively affecting Connor's health at

the Motion to Reconsider hearing. (Tr. 258; R.E. 80.) It stated “. . . the realities are it’s not good for your son to have a father who smokes. You are an example to your son. And the realities are, besides the health considerations, he looks to you as an example.” (Tr. 259; R.E. 81.) The trial court acknowledged Jarrad smoked outside the home, but it failed to consider Jarrad’s own confession of smoking in the confined spaces of a car with Connor. (Tr. 258; R.E. 80.) Certainly, this Honorable Court recognizes the health problems related to smoking and second-hand smoke. Kim is not a smoker, and second-hand smoke will continue to present itself to Connor when living in Jarrad’s home.

Moreover, there were several instances where Kim had trouble speaking with her son during her informal visitation arrangement with Jarrad. (Tr. 28, 71; R.E. 37, 52.) She left numerous text and phone messages with Jarrad, as she was always eager to speak to Connor. (Tr. 28, 71; R.E. 37, 52.) Kim was relegated to often call the daycare to speak to her son. (Tr. 71; R.E. 52.) Even though he was only four-years old, Connor had a much later bedtime with Jarrad, and Kim noticed Connor was very tired after being with his dad. (Tr. 71, 74-75; R.E. 52, 55-56.) All of these instances undoubtedly affect Connor’s well-being.

Kim re-submits that the trial court overlooked the rule held in *Hollon*. Instead, it heavily weighed one *Albright* factor against the others without fully considering the best interests of Connor. There is not a trace of evidence that Kim’s relationship with Haley had any detrimental effect upon Connor. Kim maintains an overall *productive* and *responsible* life with a successful business that continues to grow. Indeed, all the evidence supports that Connor is doing well. While the trial court found Kim’s behavior primarily caused the dissolution of the marriage, it pointed out in its opinion that the bond between Kim and her son is strong. (Mem. Op. and J. at 5; R.E. 7.) It also recognized “Kim was a good mother” and “Kim clearly wants the responsibility of raising Connor....” (Mem. Op. and J. at 3-4; R.E. 5-6.) It stated that there is no





objective proof that her behavior impacted Connor, but unfairly describes the impact of Kim's actions. (Tr. 263; R.E. 83).

The chancellor's findings are contradictory. Kim's marital fault - not her capacity as a mother - regrettably influenced the trial court's decision when determining custody more than anything else. It found no evidence that Kim's relationship negatively impacted Connor and failed to consider Jarrad's own adultery, questionable lifestyle and unstable behavior. Therefore, Kim respectfully prays this Honorable Court reverse the trial court's decision and place primary physical custody with Kim, or at a minimum, order joint physical custody to be shared by the parties.

CONCLUSION

Kim submits that the trial court erred in determining primary physical custody of Connor. The trial court recognized that Kim has the parenting skills and capacity to provide for Connor. The evidence clearly establishes that Kim is a good mother, who had a lapse in judgment, which was a symptom of an already diseased marriage. The trial court erroneously placed undue weight on Kim's moral fitness, but overlooked Jarrad's adultery and immoral behavior in its custody determination. Most importantly, Kim's behavior had no negative impact on Connor. Therefore, Kim prays for the best interest of Connor that this Honorable Court reverse and render sole custody to Kim, or in the alternative reverse and render joint physical custody to both parties. Kim also requests that in either determination this Honorable Court remand this cause of action back to the trial court with its instructions regarding a more balanced custody and visitation schedule.

Respectfully submitted, the 8th day of March, 2012.


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CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the above and foregoing pleading, via
First Class U.S. Mail, postage prepaid, to each of the following.

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So certified, this the 8th day of March, 2012.


M. CRAIG ROBERTSON, ESQ.