SUPREME COURT OF MISSISSIPPI

KATHRYN C. KLINK,	**APPELLANT**
VS.	**DOCKET NO. 2006-CA-01827**
MARC V. BREWSTER,	**APPELLEE**

APPELLEE'S BRIEF

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TABLE OF CONTENTS

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CERTIFICATE OF INTERESTED PERSONS

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

The Appellant: Kathryn C. Klink
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Murfreesboro, TN 37130

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The Trial Judge: Chancellor Percy Lynchard
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Respectfully submitted,

James W. Amos, MSB [redacted]
Attorney for Appellee

CERTIFICATE OF SERVICE

I, James W. Amos, Attorney for Appellee, Marc V. Brewster, do hereby certify that I have mailed by U. S. Mail, postage prepaid, a true and correct copy of the CERTIFICATE OF INTERESTED PERSONS to the following:

Honorable Percy Lynchard
Chancellor
P.O. Box 340
Hernando, MS 38632

Hon. Leslie B. Shumake, Jr.
P.O. Box 803
Olive Branch, MS 38654

Marc V. Brewster
7199 Benji Ave.
Horn Lake, MS 38637

Dated this 10 day of September, 2007.

James W. Amos, MSB [redacted]
Attorney for Appellee

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

SUPREME COURT OF MISSISSIPPI

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APPELLEE'S BRIEF

I.
STATEMENT OF THE ISSUES

A. WHETHER THE COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING THE TESTIMONY OF ALL WITNESSES OF THE APPELLANT EXCEPT THE APPELLANT HERSELF

B. WHETHER THE COURT APPLIED AN INCORRECT LEGAL STANDARD OR WAS MANIFESTLY WRONG OR CLEARLY ERRONEOUS BY:

(1) NOT GIVING SUFFICIENT WEIGHT TO THE AGE OF THE MINOR CHILD AND BY GIVING UNDUE WEIGHT TO THE SEX OF THE CHILD;

(2) FINDING THAT THE APPELLEE HAD BETTER PARENTING SKILLS;

(3) FINDING THAT THE EMPLOYMENT RESPONSIBILITIES FAVORED THE FATHER;

(4) FINDING THAT THE MORAL FITNESS OF THE PARTIES FAVORED THE NATURAL FATHER; AND

(5) BY SEPARATING THE MINOR CHILD FROM HIS THREE OLDER SISTERS.

II.
STATEMENT OF THE FACTS

On August 23rd, 2006, at the trial of this case, the Court stated the following:

> "This matter was previously set for trial on the 30th day of June, 2006. At that time this Court granted a motion ore tenus for continuance for the reason that written discovery had not been responded to by the Plaintiff at that time. The Court continued the matter until this date, and within the Order of Continuance specifically ordered that all written discovery propounded by the Defendant to the Plaintiff would be answered and responded to no later than July 21, 2006.
>
> At that time – at this time the Defendant has filed a Petition For Contempt and a Motion To Exclude Discovery Responses against the Plaintiff claiming that the June 30th, 2006 Order was not followed by the Defendant -- or rather the Plaintiff in as much as discovery responses were only filed on the 21st, day of August some 30 days following their due date and only two days prior to trial. These time frames and the allegations with respect to nonresponse to discovery are admitted on behalf of the Plaintiff."

The Court ruled,

> "The Court grants the Motion To Exclude Discovery Responses filed by the Defendant."

The Court ruled that the Plaintiff "....will be required to rest based solely on the testimony of the plaintiff". (Tr. 2-3)

At the time of the trial of this case, Katie Klink was living at 10294 Stephenson Lane in Olive Branch, Mississippi (Tr. 5). She lived there with her husband and four (4) children (Tr. 5). She had married her husband the Wednesday before the trial on August 23rd, 2006 (Tr. 31). Katie's four (4) children were Alexis, age 7 years, Allisa, age 5 years, Allison, age 3 years, and Jonathan, age 1 and ½ years (Tr. 6). Jonathan is the child of Marc Brewster, Appellee herein. He was born January 15th, 2005, in DeSoto County, Mississippi. (See Complaint and Answer at Clerk's Record I, Page 5 and Page 8). All four (4) children have a different father. Appellant

was only married to Allisa's father (Tr. 6-8).

Katie said she was self-employed, cleaning houses for a living, earning about $1,050.00 per month. She also was receiving $600.00 per month in child support, $200.00 per month coming from Appellee (Tr. 10). Prior to getting married to her present husband, Katie was on public assistance receiving food stamps (Tr. 11).

Katie's work routine called for her going to the house she would be cleaning at about 10:00 a.m. She would take the children with her. The children would take a nap while she was cleaning the house (Tr. 12).

Appellant's two older children attend school. Appellant says she gets up about 5:30 a.m. to get them ready for school. She would have them at the bus stop by 6:20 a.m., then come back to the house, wait for the other two children to wake up so she could get them cleaned up, ready and fed breakfast (Tr.12).

Katie would usually be home from working by 1:00 p.m. or so (Tr. 14).

After the older would get home from school Katie, her 6 year old niece, McKayla, would also get off the bus with Katie's children. Katie would keep McKayla until her mother, Shannon, got home. Shannon was her best friend (Tr.14).

The Appellee lived with Katie until about three months after Jonathan was born (Tr.15).

Marc works for ASICS where he works a regular full time 40 hour week job (Tr. 16). Katie testified that Marc, for the most part, took Jonathan to the doctor (Tr. 17-18). Katie testified that she had the better parenting skills (Tr.19).

On cross-examination, Katie testified that she decided Walter Stanley was the father of Alison only after Marc had submitted to a DNA test that confirmed that he, Marc, was not the

father (Tr. 31).

Katie Klink said that in addition to she and her children, since the present case has been pending, her friend, Josh Jordan, Eric Brewster (Marc's brother), a friend Erin, and Chris, her now husband, had at one time or another lived in her house, some of them sleeping in the garage (Tr. 35-37). Katie testified that she went to Jonathan's first doctor's appointment which was his two week checkup and with Marc to Jonathan's circumcision. Since then, she said Marc has taken Jonathan to the doctor (Tr. 42).

Katie said that she knew Eric, (Marc's brother) was smoking dope at her house when he lived in the garage. She also said he drank (Tr. 43).

There was a Temporary Order entered on September 28th, 2005 (Clerk's Record Vol. I, Pages 21-22). Katie was given temporary custody with Marc having visitation from 6:00 p.m. each Tuesday night until 8:00 a.m. each Wednesday, from 6:00 p.m. every Thursday until 8:00 a.m. every Friday, and every other weekend from Thursday at 6:00 p.m. until 6:00 p.m. on Sunday. Katie admitted she had denied Marc his visitation during Thanksgiving of 2005 (Tr. 47). Katie said had allowed two of her children to share a seat belt in the back seat of her car and allowed her 6 year-old child to ride in the front seat of her car (Tr. 54).

At the conclusion of Katie's testimony, her attorney rested her case (Tr. 60). The Court had previously ruled that all of Katie's witnesses would be excluded from testifying because she had failed, pursuant to a Court Order entered nunc pro tunc June 30th, 2006 (Clerk's Record, Vol. I, Page 41) to provide all written discovery requested by Appellee by July 21st, 2006. In fact, the discovery responses were not submitted until two days prior to trial (Tr. 3).

Appellee called as his first witness, Christopher Allen White. He testified that there were

drugs consumed regularly at Katie's house. This included marijuana. He also said he had seen her drink around her children two times (Tr. 61-62). This witness was aware of the three people living at Katie's house, Marc, Eric and Erin. Mr. White testified that he smoke marijuana in Katie Kink's home (Tr. 66) but he said Marc does not smoke it (Tr. 68). He said he had never seen Marc smoke marijuana for as long as he had known him (Tr. 69). He also testified that Marc had the best parenting skills (Tr. 64).

Appellee's attorney called Marc's wife, Crystal Brewster, as his second witness. She said she and Marc married in November, 2005, and had a child, Braden (Tr. 72). She said that prior to the Temporary Order, Marc had Jonathan one or two nights a week and every weekend (Tr. 73). She said Marc took care of Jonathan when he was visiting. He would bath him, play with him, and take him to the park. Crystal told the Court that she would take care of Jonathan when Marc was at work (Tr. 74). She said Marc worked at ASICS from 7:45 a.m. to about 4:15 p.m. during the week and on an occasional Saturday (Tr. 75). She criticized the parenting skills of Katie and how she failed to keep her house clean (Tr. 76-84). She also said Katie failed to give Jonathan his medicine (Tr. 90) and he would have a diaper rash, matted hair and dirty clothes on when she and Marc would pick Jonathan up for visits (Tr. 90-91).

Vickie Howard was Marc's next witness. She is Marc's mother-in-law. Marc had lived with her from June, 2005 until a little bit into August, 2005 (Tr. 109). She testified that Jonathan visited with Marc at her house one to two nights per week and every weekend. She said he was an excellent father; that he took care of Jonathan, bathed him, fed him and took care of his every need (Tr. 110). She went on to say that Marc was now getting Jonathan every Tuesday, Thursday and every other weekend. She said they would come to her house and she would go to

theirs and they would take Jonathan out with other children to spend time with them. She said Jonathan was always dirty; his hair always dirty and matted; he smelled awful; his bottom never was clean; he was sick and he had flea and mosquito bites (Tr.110-111). She said Marc used to bring Allison (Katie's child) when he brought Jonathan (Tr. 111). Vickie Howard lives in Nesbit, Mississippi, with her husband and two (2) grandchildren (Tr. 111).

Eric Brewster, Marc's twin brother, was called to testify. He lived with Katie Klink for a year and a half. He said there was marijuana, cocaine and alcohol in Katie's home. He said he had used the drugs but his brother Marc had not. In fact, he said his brother would not allow him to do drugs or smoke anything in front of Jonathan. He said he had seen Katie drinking (Tr. 117-118). He had slept with Katie on one occasion while living in her house. He also know she had slept with two other people while he lived there (Tr. 119).

Katie Klink was called as an adverse witness. She said Jonathan had ingested lighting fluid while in her care (Tr. 127). She denied sleeping with Eric Brewster or the other two people Eric said he knew she had slept with (Tr. 128). She admitted that Walter (Stanley) was the name of her child, Allison's father. She had, at one time, thought Marc was Allison's father (Tr. 128-129).

Appellee was the last witness to testify in his case in chief. He said he was asking the Court for custody of Jonathan. He had prepared a log of the time he had spent with Jonathan prior to the temporary hearing (Tr. 132). The log accurately reflected the time he spent with his son (Tr. 133) (Ex. 7). He said, pursuant to his attorney's advise, he had marked medicine bottles he gave to Katie to give to Jonathan. He said when he got the medicine bottles back, Katie may have given Jonathan a dose but not what he should have been given. He also said he had

provided care for Jonathan from birth, had played with him, fed him, bathed him, and watched television with him (Tr. 133).

Marc's testimony was that he worked at ASICS from 7:45 in the morning until 4:15 p.m. He said he takes care of Jonathan when he is home and if he has to work while Jonathan is in his home, his wife, Crystal cares for Jonathan. If Jonathan wakes up at night, he gets up and waits with him until he goes back to sleep (Tr. 133-134).

Jonathan testified that he believed he had the better parenting skills because he takes care of his son, makes sure he is clean, bathes him and feeds him (Tr. 136). Marc also said he could provide primary child care if given custody (Tr. 136). He believes his employment is more stable than Katie's and that his home is more stable (Tr. 136-137). Marc said neither he nor his wife, Crystal, smoke or drink around Jonathan (Tr. 137). Marc was familiar with Jonathan's favorite television show and Jonathan's favorite food (Tr. 138). He also believed his mental and physical health is better than Katie's. He said he does not smoke. He said Jonathan was more tied to him than Katie and that he was more morally fit than Katie (Tr. 138).

Marc went on to say that the continuity of care prior to the separation of the parties was equal (Tr. 139).

Marc said he was asking the Court for attorney fees for the contempt charge against Katie for her failing to provide discovery (Tr. 139).

Marc testified that after picking up Jonathan and bringing him home, Jonathan had diaper rash. This happened several times (Tr. 144).

In testimony regarding a video that was being played for the Court, Marc Brewster testified to cat feces being on the floor by Jonathan's toy at Katie's house. There was also cat

feces on the carpet by the fire place and movies (Tr.149-150). Marc testified he was the better parent to have custody of his child (Tr. 150-151).

On cross-examination Marc testified that Jonathan was usually dirty when he picked him up from Katie's and that he would put him in the tub and wash him (Tr. 159-160).

When asked on cross-examination about Katie's experience as a parent he said that Jonathan kept coming to his house with diaper rash (Tr. 160).

After the conclusion of Marc Brewster's testimony the Court asked a few questions of him. The Court determined that Marc had been married for almost a year to Crystal; and that he had been employed at ASICS for about five years (Tr. 169).

After all parties had rested their case and after a brief recess, the Court dictated his Opinion into the record (Tr. 169-181). The Court found that the Plaintiff was a 23 year-old mother married for the past seven (7) days; that she was employed sporadically as a house cleaner, mainly for family and friends; that she is the mother of four (4) children all sired by different fathers, only one of to whom she was married; and that she earns about $1,450.00 per month (Tr. 170-171).

The Court found that the Defendant father was 30 years old and was currently married and had been for about a year; that he is the father of two children, including the one which is the subject of this action; that he is employed with ASICS and has been for about five years earning a net salary of about $2,025.00 per month; and that he lives in Horn Lake with his wife and their five month old son (Tr. 171).

The Court found that Jonathan is approximately 20 months old; was born out of wedlock to the parties; was formerly in the exclusive custody of the mother by agreement; that following

a temporary hearing the mother had exclusive custody by a Court Order; that the Defendant father had extensive visitation with the child both before and after the Temporary Order (Tr. 171).

The Court found that both parties were seeking an order of affiliation declaring the Defendant to be the lawful father of the child, Jonathan. Both parties were also seeking custody and related relief (Tr. 171-172).

The Court ordered that the Defendant was the father of the child and that the birth certificate should be amended to reflect the Court's finding (Tr. 172).

In regard to the central issue, custody of the child, the Court applied the Albright factors. The Court found that the child was twenty months old and that the "tender years" doctrine favored the mother but the child was a male and that favored the father. Therefore, the element of "tender years" favored neither party (Tr. 173). The Court found the element of continuity of care favored the mother (Tr. 173). The Court found that the element of parenting skills favored the father (Tr. 173-174). The Court said that the element of employment responsibilities favors the father and employment stability favored the father (Tr. 174-175). The Court found that the elements of home, school and community records favored neither party (Tr.175). The Court found that the element of the health of the child, because of the child's asthmatic condition and because the mother smokes and the father does not, favors the father (Tr. 175-176). The elements of the health of the parents and the elements of willingness to provide primary care were found by the Court to be shared equally and favored neither party (Tr. 176). As to the moral fitness of the parties, because of the drug use or tolerance of drug use exhibited by the mother in her home, the numerous relationships resulting in four children from four different

fathers, only one to whom she was married, the Court found that element to favor the father (Tr. 176-177). The Court found that the stability of the home environment of the father is more conducive to custody and favors the father (Tr. 177). The element of emotional ties favored neither party (Tr. 177).

Based upon the totality of the circumstances as directed by Albright v. Albright, the Court found that sole physical custody of Jonathan should be awarded to the natural father subject to reasonable rights of visitation which the natural mother may enjoy pursuant to the standard Farese visitation schedule (Tr. 177-178). The Court awarded child support to be paid by the mother of $100.00 per month. The father was to provide medical insurance through his place of employment with one-half (1/2) of any non-covered medicals being paid by each party (Tr. 178-179).

The Court awarded Appellee the sum of $2,208.00 as attorney fees for contempt matters along with all court costs (Tr. 180).

III.
SUMMARY OF THE ARGUMENT

Appellee would show that this Court should affirm the decision of the Chancellor. The Chancery Court Judge's Opinion should not be disturbed because his Opinion is supported by substantial evidence. Neither did the Chancellor abuse his discretion nor was he manifestly wrong, clearly erroneous nor did he apply an erroneous legal standard in making his decision in the court below.

The Appellant would have this Court believe that the Chancellor was wrong when he excluded the testimony of all her witnesses except for herself. Appellee filed a Petition For Contempt and Motion To Exclude Discovery Responses on July 31, 2006 (Clerk's Papers, Pages 37-39). In the said Petition For Contempt, Appellee recited that the Court had entered an Order Of Continuance on July 18th, 2006 nunc pro tunc to June 30, 2006. The Order Of Continuance mentioned, among other things, that all written discovery requested by the Defendant, Marc Brewster, be answered no later than July 21st, 2006. The Motion also set forth that the Appellee had failed to respond to the discovery requests pursuant to the deadline imposed by the Court. The Order said that Appellant is in willful disobedience of the Orders of the Court and that she should be punished for her refusal to abide by such Order. Defendant also asked that the Plaintiff's witnesses, other than herself, be excluded. The Court correctly ruled that the Motion To Exclude Discovery Responses be granted (Tr. 3).

IV.
ARGUMENT

I. WHETHER THE COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING THE TESTIMONY OF ALL WITNESSES OF APPELLANT EXCEPT HERSELF

As stated by Appellant in her argument on page 11 of her brief,

> "The Court ruled prior to the start of testimony that all witnesses other than Katie Klink herself would be prohibited from testifying."

In so ruling the lower Court found that it had previously continued the matter for the specific reason for requiring responses to discovery; that answers had only been made to discovery some two days prior to trial.

Rule 37, Mississippi Rules of Civil Procedure, provides for sanctions when a question propounded or submitted is not answered. Failure to answer may be considered contempt of court (Rule 37(b)(1). Rule 37(b)(2)(B) basically provides if a party fails to obey an order to provide or permit discovery, the Court may order that the disobedient party may not support or oppose designated claims or defenses or prohibit him from introducing designated matters into evidence. This is exactly what happened. The Appellant failed to timely file responses to discovery. Therefore, the Chancellor, after giving plaintiff a specific amount of time to reply found the plaintiff in contempt and punished her accordingly. She was ordered to pay attorney's fees and she was not allowed to put on any witnesses to prove her claims, except herself.

Appellant cited no case law or specific rule for her reasoning that the Court committed reversible error by excluding testimony of all witnesses except herself.

Appellee cites the case of Williams v. Puryear, 515 So. 2d 1231 (1987) in support of his position. On page 1232 of that case the Supreme Court Justice Roy Noble Lee said,

> "Most appellate courts have indicated that Rule 37(b) means exactly what it says, i.e., follow the rule, get the case ready, and avoid being dilatory. This Court now implements that policy."

The present case had been set for trial on June 30th, 2006. A continuance had to be granted because discovery had not been responded to by the Plaintiff. The Court rescheduled the trial for August 23, 2006 and gave the Plaintiff until July 21st, 2006 to comply with discovery. Two days prior to the trial, August 21st, 2006, Plaintiff filed discovery responses. The Chancellor, who is in the best position to make such decisions, ruled that discovery responses came too late and because of that the Plaintiff could produce no witnesses other than herself to put on proof about her case (Tr. 2-3).

II. WHETHER THE COURT APPLIED AN INCORRECT LEGAL STANDARD OR WAS MANIFESTLY WRONG OR CLEARLY ERRONEOUS BY:

(1) NOT GIVING SUFFICIENT WEIGHT TO THE AGE OF THE MINOR CHILD AND BY GIVING UNDUE WEIGHT TO THE SEX OF THE CHILD;

(2) FINDING THAT THE APPELLEE HAD BETTER PARENTING SKILLS;

(3) FINDING THAT THE EMPLOYMENT RESPONSIBILITIES FAVORED THE FATHER;

(4) FINDING THAT THE MORAL FITNESS OF THE PARTIES FAVORED THE NATURAL FATHER; AND

(5) BY SEPARTING THE MINOR CHILD FROM HIS THREE OLDER SISTERS.

On appeal of a case from a Judge such a Chancellor in a case tried solely by the Court in the absence of a jury, the standard of review by the Appellate Court in Mississippi is limited.

> "....the Chancellor must either commit manifest error, act in a way that is clearly erroneous, or apply an erroneous legal standard before this Court can reverse. M.C.M.J. v C.E.J. , 715 2o.2d 774, 776 (Paragraph 10) (Miss. 1998). This Court will not reverse the Chancellor's findings unless it is demonstrated that the decision was not supported by substantial, credible evidence. Dunaway v. Busbie , 498 So.2d, 1218, 1221 (Miss. 1986)."

This quote is found in the case of Passmore vs. Passmore , 820 So.2d, 747, 749, (Miss. 2002) paragraph 6.

Appellant relies on Passmore , supra, in support of her case for a presumption that the mother is better suited to raise a young child. In Passmore, supra, at paragraph 9, the Court also says that pursuant to Mississippi Code Annotated , Section 93-5-24(5),

> "....there shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody."

The Court went on to say,

> "In essence, while the father no longer has to prove the mother unfit to rebut the automatic application of the tender years presumption, our courts have determined that along with the rest of the Albright factors, the tender years doctrine is a 'factor worthy of weight in determining the best interest of a child."

In other words, the age and sex of a child are only factors to be considered under Albright. The Chancellor found, as set forth in his Opinion, that Jonathan was child of tender years which favored the mother but Jonathan is male and that fact favors the father. The Court therefore ruled that the factors of age and sex of the child negated each other and favored neither

parent (Tr. 173). It does not appear that he gave more weight to either factor but considered them equally.

In addressing the factor of continuity of care, the Court found that factor to favor the natural mother. Appellant would have this Court believe this factor should be given more weight than other factors. Appellee has not found any where in the case of Albright v. Albright 437 So.2d, 1003 (Miss. 1983), (where the Albright factors were first introduced into Mississippi Jurisprudence), that any one factor carries more weight than another factor. Appellant believes that courts are to treat all of the factors as a whole and determine in whose favor custody between natural parents is weighted.

In discussing parenting skills, the court found that factor to favor the natural father. The Court said,

> "It was the natural father who took it upon himself in the majority of cases to seek medical treatment for the child to set up his medical appointment and to take care of administering properly the medicine prescribed for the child."

The Court otherwise found the parties equal when it came to parenting skills (Tr. 173-174).

The Appellant takes exception to the findings by the lower Court in regard to the employment stability of the parties. The Court found clearly that this factor favored the father. He had set working hours and employment longevity of five years with the same job (Tr. 174). The Court found that factors relating to the home, school, and community records of Jonathan favored neither party. However, the Court determined that since Jonathan has as asthmatic

condition and since the father is a non-smoker and the mother is a smoker and has smoked in the presence of Jonathan, the health of the child, because of his asthmatic condition, is better suited to be dealt with by the natural father (Tr. 175).

The Court determined that the health of the mother and father would hinder neither parent from being able to take care of the child (Tr. 176).

The Court found that the moral fitness of the parties favored the natural father. The Court made findings of drug use or tolerance of drug use exhibited by the natural mother in her house, and the numerous relationships which resulted in four children from four different fathers, only one to whom she was married (Tr. 176-177).

In the case of Beasley v. Scott , 900 So.2d, 1217 (Miss. 2003) cited by Appellant, it is true that the Court determined that Katrina Scott did drink alcohol and smoke marijuana but there was no testimony that she did so in the presence of her child. The Chancellor in that case found that the father was more morally fit that mother. (Beasley , Paragraph 13, Moral Fitness of the Parents). The Court of Appeals said that after weighing all the factors, the Chancellor found the best interests of Victoria would be served by granting primary custody to Katrina. In reviewing the record, it was found that the Chancellor's decision was supported by the record.

Appellant cites Mixon v. Bullard , 217 So.2d. 28 (Miss. 1968) as a authority for the issue of separating Jonathan from his sisters. The Court in that case on pages 30 and 31 did state that the Court should attempt, insofar as possible, to try to keep the children together in a family unit. In the case at bar we have a mother, four children, four fathers and a husband of one week as of the date of the trial on one side. Then we have the father of Jonathan who has been married for a year, and has a young child with his wife, Crystal, on the other side. The logistics of trying to

keep all of the children together as a family unit is not practical. The Chancellor in his Opinion as found on pages 177 and 178 of the transcript made the following statement:

> "Considering all of these factors in the totality of the circumstances as directed by Albright v. Albright, it is clear to this Court that the actual sole physical custody of the child is best suited with the natural father subject to the reasonable rights of visitation which the natural mother may enjoy pursuant to the standard Farese visitation schedule that counsel should be familiar with."

In Massey v. Huggins, 799 So.2d. 902, 908, Paragraph 20, (Miss. 2000), it was found that the desire to not separate the children was simply an additional ground. In Massey the children were separated.

V.
CONCLUSION

When a party appeals the decision and order of a Chancery Court Judge in Mississippi, the review of child custody matters are constrained by a deferential standard. The Court has said in Caswell v. Caswell , 763 So.2d. 890 (Miss. 2000),

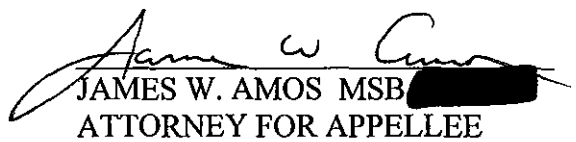
> "Absent an abuse of discretion or manifestly wrong or clearly erroneous finding our hands are tied and we must uphold the decision of the Chancellor. Ayers v. Ayers , 734 So.2d. 213, 215 (Miss. App. 1999). If substantial evidence exits to support the Chancellor's findings of fact, broad discretion is afforded his determination. McEwen v. McEwen 631 So.2d. 821, 823 (Miss. 1994)."

Consider the case of Tanner v. Tanner , 2007 MSCA 2006-CA-00423- 052207, rendered May 22, 2007. There the Chancellor awarded physical custody of the minor child to the father. The Chancellor made findings on the record that two Albright factors favored the mother and the two factors favored the father and the remaining factors were either equal or did not apply. The Court then appointed a guardian ad litem to review and report on the mother's health problems, the father's work schedule and anything that might affect the best interest of the child. The guardian ad litem's report did not favor either parent. The Chancellor then awarded custody to the father. The mother appealed. She contended that she did not have to work and considering the father's work schedule it would be in the best interest of the child for the Court to have awarded custody to her. The lower Court found that the employment factor favored both parties equally. The Court of Appeals affirmed the Chancery Court's decision.

Appellee contends that the Chancellor in the Court below made his findings on substantial evidence, that he did not commit manifest error, that he did not act in any way that is

clearly erroneous, and that he did not apply an erroneous legal standard. Therefore, this Court should affirm the Chancellor's Order granting custody of Jonathan to this father, Marc Brewster.

Respectfully submitted,



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SUPREME COURT OF MISSISSIPPI

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CERTIFICATE OF SERVICE

I, James W. Amos, Attorney for Appellee, Marc V. Brewster, do hereby certify that I have mailed by U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing APPELLEE'S BRIEF to the following:

Honorable Percy Lynchard
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Attorney at Law
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Marc V. Brewster
7199 Benji Ave.
Horn Lake, MS 38637

Dated this 10th day of September, 2007.

JAMES W. AMOS