IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2006-CA-01930

DEMETRI MARSHALL — APPELLANT

VS.

LIKITHA HARRIS — APPELLEE

APPEAL FROM THE CHANCERY COURT
OF CLAIBORNE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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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.

1. Demetri Marshall, Appellant.

2. Jessie L. Evans, Attorney for Appellant.

3. Likitha Harris, Appellee.

4. Melvin H. McFatter, Attorney for Appellee.

5. The Hon. George Ward, Claiborne County Chancery Court Judge.

RESPECTFULLY SUBMITTED, this the 25th day of JULY, 2007.

MELVIN H. MCFATTER
Attorney of Record for
Likitha Harris, Appellee

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STATEMENT OF THE CASE

This is a bastardy proceeding in which paternity is admitted. The dispute on appeal is the custody of the older of the two illegitimate children, the extent of the father's visitation with the children, and whether the father should pay the mother's attorney fees in defending against this appeal.

Appellee, Likitha M. Harris, hereinafter referred to as "Ms. Harris," is the mother of two male children born out of wedlock, Malik Marshall born March 3, 1999, and O'Naja Marhsall born April 24, 2005. On April 21, 2006, Ms. Harris filed her complaint in the Chancery Court of Claiborne County against the Appellant, Demetri W. Marshall, hereinafter referred to as "Dr. Marshall," seeking to establish Dr. Marshall as biological father of both said children and also seeking child support, attorney fees and costs. On May 8, 2006, Dr. Marshall filed his petition in the Chancery Court of Claiborne County against Ms. Harris in a separate cause of action admitting he is the father of both of her said children and seeking custody of the older child, Malik, and extended visitation privileges with the minor children. By Agreed Order entered July 20, 2006, Dr. Marshall again admitted paternity of both of the minor children, Ms. Harris was granted temporary custody of both of the minor children subject to visitation rights of Dr. Marshall, and Dr. Marshall was required to pay temporary child support. By Agreed Order entered August 17, 2006, both of the aforesaid suits were consolidated into one cause of action.

This case was tried on the merits as to all issues raised by the pleadings on August 25, 2006. After the close of evidence, the Chancellor announced that, after considering the Albright factors and the rebuttable presumption that siblings should not be separated, the Chancellor had decided to allow Ms. Harris to retain custody of both of the minor children. The Chancellor opted not to dictate his detailed opinion into the record at that time. He left the July 20, 2006,

temporary Agreed Order in place and stated that he would give his detailed written opinion at a later time.

On October 6, 2006, the Chancellor entered his detailed written opinion and final judgment. In his written opinion, the Chancellor, after applying the evidence to the Albright factors and determining that Dr. Marshall had failed to meet his burden of proving exceptional circumstances to justify separation of the siblings, rendered final judgment declaring Dr. Marshall to be the father of both of the minor children, granting permanent custody of both of the minor children to Ms. Harris, granting visitation rights to Dr. Marshall as detailed in a visitation schedule, requiring Dr. Marshall to pay support to Ms. Harris for the minor children, requiring Dr. Marshall, pursuant to Miss. Code Ann. §93-9-45, to pay to Ms. Harris $2,000.00 toward her attorney fees at trial and assessing costs against Dr. Marshall. Feeling aggrieved by this final judgment, Dr. Marshall appealed to this court seeking custody of the older child and more extensive visitation rights. Ms. Harris elected not to cross appeal but is filing herein with the Appellee's Brief a motion asking this Court to award her attorney fees in defending against Dr. Marshall's appeal.

STATEMENT OF FACTS

This case is best described as the HBO television series *Big Love* with the setting changed from Utah to Mississippi.

Dr. Marshall, is a physician. (Transcript; Demetri Marshall, page 3, line 22 – page 4, line 1; and page 47, lines 13-23) Dr. Marshall has ten (10) children. He is the biological father of eight (8) of those children and the other two (2) are adopted. (Transcript; Demetri Marshall, page 38, lines 4-5) Dr. Marshall's two (2) oldest children are the issue of a marriage that he entered into in 1973. Dr. Marshall and his wife separated in 1979 and were divorced about 1984. (Transcript; Demetri Marshall, page 36, line 24 – page 37, line 16) Dr. Marshall has never remarried. The two (2) oldest children, the issue of said marriage, were both adults at the time of the hearing of this case on August 25, 2006. (Transcript; Demetri Marshall, page 37, lines 17-28) Also, the older of the two (2) adopted children was an adult at the time of said hearing.(Transcript; Demetri Marshall, page 38, lines 7-13)

At the time of said hearing, Dr. Marshall had seven (7) minor children as follows:

Name	Date of Birth
Ayanna Marshall	11-03-87
Mario Marshall	08-01-89
Assata Marshall	04-11-91
Hekima Marshall	09-05-91
Malik Marshall	03-03-99
Chokwe Marshall	08-26-04

O'Naja Marshall (called Sekou by Dr. Marshall)[1] 04-24-05

(Exhibit 2; Rule 8.05 Financial Disclosure of Demetri Marshall, page 7)

Ms. Harris is the mother of Malik Marshall and O'Naja (Sekou) Marshall. (Transcript; Demetri Marshall, page 45, lines 13-15; and Likitha Harris, page 81, lines 14-16) Dr. Marshall admits he is the biological father of both Malik and O'Naja (Sekou). (Transcript; Demetri Marshall, page 5, line 6 – page 6, line 28; and Appeal Record; Petition for Visitation, Adjudication, Paternity and Other Relief, page 3 and Agreed Order, pages 41-42) The other five (5) aforesaid minor children of Dr. Marshall have five (5) different mothers and Dr. Marshall has never been married to any of those five (5) women. (Transcript; Demetri Marshall, page 38, lines 20-26 and page 44, lines 3-10)

At the time of trial, Dr. Marshall had custody of Mario Marshall an eighteen (18) year old male whom Dr. Marshall had adopted and Assata Marshall, his fifteen (15) year old biological daughter. Assata's mother was deceased having died of cancer. (Transcript; Demetri Marshall, page 40, line 18 – page 41, line 17) The Chancellor correctly determined that Assata's mother whom Dr. Marshall lived with and cared for while she was dying of cancer was a former lover and not a former wife. (Transcript; Dr. Marshall, page 8, lines 8-12, page 41, lines 9-17 and page 44, lines 3-10; Likitha Harris, page 85, line 19 – page 86, line 1; and Appeal Record, Final Judgment, pages 57-58)

Ayanna Marshall, his eighteen (18) year old biological daughter, was in the custody of her mother, Belinda Foster, and attending college in Alabama. (Transcript; Demetri Marshall, page 39, lines 17-24 and page 40, lines 12-17)

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[1] Ms. Harris and Dr. Marshall were unable to agree on this child's name. Dr. Marshall had named the older child Malik, in a naming ceremony after the child had come home from the hospital. Ms. Harris named the younger child O'Naja while she was still in the hospital, and this name appears on the child's birth certificate. Dr. Marshall refuses to sign the child's birth certificate. He calls this child Sekou. (Transcript; Demetri Marshall, page 5, line 16 – page 6, line 28, page 53, line 25 – page 54, line 18; and Likitha Harris, page 88, line 24 – page 89, line 29, and page 115, lines 13-25)

Hekima Marshall, his fourteen (14) year old biological son was in the custody of his mother in Texas. (Transcript; Demetri Marshall, page 41, line 24 – page 42, line 4)

Chokwe Marshall, his two (2) year old biological son was in the custody of his mother in Jackson, Mississippi. (Transcript; Demetri Marshall, page 43, line 8 and page 44, lines 11-25)

Malik Marshall, his seven (7) year old biological son, and O'Naja (Sekou) Marshall, his one (1) year old biological son, were both in the custody of their mother, Ms. Harris, in Jackson, Mississippi. (Transcript; Likitha Harris, page 64, line 27 – page 65, line 18 and page 66, lines 14-16)

Dr. Marshall testified that he was providing support for Chokwe through court order in the amount of $500.00 a month, support for Ayanna through court order in the amount of $400.00 per month, and support for Hekima through court order in the amount of $400.00 per month. (Transcript; Demetri Marshall, page 15, line 22 – page 16, line 18; page 41, line 24 – page 42, line 4; and page 44, lines 16-25)

Dr. Marshall and Ms. Harris began a sexual relationship in 1997. Dr. Marshall, who is twenty-one (21) years older than Ms. Harris was already a practicing physician and Ms. Harris was a nursing student. (Transcript; Demetri Marshall, page 4, lines 14-28; and Likitha Harris, page 81, lines 5-11) Prior to 2003, Ms. Harris and Malik lived with Ms. Harris' mother in Port Gibson. (Transcript; Demetri Marshall, page 8, lines 5-6) In 2003, Ms. Harris moved from Port Gibson to Jackson and began living in a home provided for her by Dr. Marshall. This move was made because Dr. Marshall wanted Malik to attend the Adhiambo private school in Jackson. (Transcript, Demetri Marshall, page 8, line 4 – page 9, line 26; and Likitha Harris, page 84, line 21 – page 85, line 5)

The sexual relationship between Dr. Marshall and Ms. Harris was ended by Ms. Harris about September 2004. Ms. Harris, who was pregnant with Dr. Marshall's child, O'Naja

(Sekou), learned that Dr. Marshall had fathered another child, Chokwe, on August 26, 2004, by another woman. Dr. Marshall wanted Ms. Harris to accept this as part of what he considered his extended family, but Ms. Harris was unwilling to do so. (Transcript; Likitha Harris, page 82, line 3 – page 83, line 20) Ms. Harris had initially entertained hopes that Dr. Marshall would marry her, but by the time of trial Ms. Harris had resigned herself to the fact that Dr. Marshall would never marry her and that their relationship was forever over. (Transcript; Likitha Harris, page 73, lines 2-18, page 81, lines 17-29 and page 113, line 26 – page 114, line 8)

In June of 2006, Ms. Harris, Malik and O'Naja (Sekou) moved out of the house provided by Dr. Marshall and into a two (2) bedroom rented apartment in Jackson. (Transcript; Likitha Harris, page 64, Line 27 – page 65, line 18 and page 66, lines 14-16) Ms. Harris made this move to obtain privacy, to get herself out from under the control of Dr. Marshall, and to put closure to their relationship. (Transcript; Likitha Harris, page 66, line 20 – page 67, line 18)

Ms. Harris has never been married. (Transcript, Likitha Harris, page 81, lines 12-13) Malik and O'Naja (Sekou) are her only children. (Transcript; Demetri Marshall, page 45, lines 13-15; and Likitha Harris, page 81, lines 14-16) Malik and O'Naja (Sekou) have both lived with and been continuously in the custody of their mother, Ms. Harris, from the time of their respective births. (Transcript; Likitha Harris, page 70, line 23 – page 71, line 25; page 83, lines 21-22 and page 87, line 20 – page 88, line 2)

Dr. Marshall's employment and personal life impose upon him a hectic schedule. Dr. Marshall has been employed as a physician at the Claiborne County Family Health Center in Port Gibson since 1987. (Transcript; Demetri Marshall, page 47, lines 13-23) Dr. Marshall works there fulltime as a physician. (Transcript; Demetri Marshall, page 50, line 11 – page 51, line 28) One of the children in Dr. Marshall's custody, Mario, attends public school in Port Gibson and the other child in Dr. Marshall's custody, Assatta, attends public school in Jackson. (Transcript;

Demetri Marshall, page 46, lines 9-17) In order to meet the demands of his work schedule, and the demands of his children attending school in two different cities, Dr. Marshall divides his time, more or less equally, between Port Gibson and Jackson. Typically, Dr. Marshall spends Tuesday, Wednesday and Thursday nights in Jackson and Friday, Saturday, Sunday and Monday nights in Port Gibson (Transcript; Demetri Marshall, page 14, lines 16 – page 15, line 18) To meet his work schedule and Mario's school schedule, Dr. Marshall and Mario would often leave Jackson going to Port Gibson at 3:00 or 4:00 a.m. (Transcript; Likitha Harris, page 87, lines 14-19) Ms. Harris does not approve of this and does not want her child, Malik, on the highway in the wee hours of the morning. (Transcript; Likitha Harris, page 96, lines 5-14)

Ms. Harris lives and works in Jackson. Malik is in private school in Jackson and O'Naja (Sekou) is in daycare in Jackson when Ms. Harris is at work. Ms. Harris's schedule is considerably less hectic and more stable than that of Dr. Marshall. (Transcript; Likitha Harris, page 68, line 4 – page 69, line 17 and page 70, lines 9-22)

Dr. Marshall sought custody of only the seven (7) year old child, Malik, and therefore sought to separate him from his one (1) year old sibling, O'Naja (Sekou). (Transcript; Demetri Marshall, page 16, lines 19-24; page 61, lines 11-15) Dr. Marshall was given ample opportunity by both his attorney and Ms. Harris's attorney to present evidence of exceptional circumstances in an attempt to overcome the legal presumption against splitting custody of siblings, but he failed to meet that burden. Dr. Marshall stated generally that he wanted custody of Malik so that he could exert more control over Malik's extra curricular activities and exert more control and discipline over Malik. He felt Malik was at an age that a father-son relationship was important to him. (Transcript; Demetri Marshall, page 16, line 25 – page 21, line 29, page 23, line 4 – page 24, line 27, page 26, line 9 – page 27, line 9 and page 61, line 15 – page 62, line 6)

Although given the opportunity, Dr. Marshall also failed to introduce any significant evidence regarding the affect that separation would have on the minor children. (Transcript; Demetri Marshall, page 29, line 28 – page 31, line 11) Ms. Harris testified that even the short separation of the siblings when Malik was with Dr. Marshall during the month of July had adversely affected his younger brother, O'Naja (Sekou). (Transcript; Likitha Harris, page 70, line 23 – page 71, line 25)

SUMMARY OF THE ARGUMENT

I. WHETHER THE CHANCELLOR PROPERLY APPLIED THE LEGAL PRINCIPLES STATED IN *SPARKMAN V. SPARKMAN*

:

The Chancellor properly applied the legal principles stated in *Sparkman v. Sparkman*, 441 So.2d 1361 (Miss. 1983), by finding that Dr. Marshall had failed to submit adequate evidence to meet his burden of proving exceptional circumstances to rebut the presumption that it is not in the best interest of siblings to separate them, and also by properly applying the evidence to the Albright factors in determining it was in the best interest of the minor children that their mother retain custody of both of them.

II. WHETHER THE LOWER COURT UNDULY CURTAILED THE EXERCISE OF APPELLANT'S VISITATION WITH THE MINOR CHILDREN

The Chancellor was well within his broad discretion to determine the best interest of the children with regard to visitation rights, and provided Dr. Marshall ample visitation with his minor children.

III. WHETHER APPELLANT SHOULD BE REQUIRED TO PAY APPELLEE'S ATTORNEY FEES AND COSTS IN DEFENDING THIS APPEAL

Upon affirmation of the trial court's order of filiation and support, Ms. Harris, pursuant to Miss. Code Ann. § 93-9-45, is entitled to reasonable attorney fees for defending this appeal.

Because Ms. Harris was properly awarded attorney fees in the trial court, if the trial court's decision is affirmed by this Court, Ms. Harris is also entitled to attorney fees on appeal.

Because Dr. Marshall's appeal is frivolous, Ms. Harris is entitled to reasonable attorney fees and double costs for defending against it pursuant to Miss. R. App. P. 38.

ARGUMENT

STANDARD OF REVIEW:

In child custody cases, the polestar consideration is always the best interest and welfare of the minor children. *Copeland v. Copeland*, 904 So.2d 1066, 1074 (P31) (Miss. 2004). In custody cases, the chancellor is in the best position to evaluate the evidence and determine the best interest of the minor children. Therefore, the appellate courts apply a limited scope of review and do not substitute their judgment for that of the chancellor. *Copeland v. Copeland*, supra., at 1074 (P30). In child custody cases, the appellate court will not disturb the chancellor's judgment unless: (1) the chancellor's judgment is not supported by substantial evidence; (2) the chancellor abused his discretion; (3) the chancellor was manifestly wrong; (4) the chancellor was clearly erroneous; or (5) the chancellor applied an erroneous legal standard. *Copeland v. Copeland,* supra.

I. WHETHER THE CHANCELLOR PROPERLY APPLIED THE LEGAL PRINCIPLES STATED IN SPARKMAN V. SPARKMAN

The applicable legal principle is as follows: There is no *per se* rule that children should never be separated. However, it is presumed that it is in the children's best interest not to be separated. Siblings should remain together unless the party seeking to separate the children overcomes that presumption with evidence of unusual and compelling circumstances proving that it is in the children's best interest to be separated. *Sparkman v. Sparkman*, 441 So.2d 1361 (Miss. 1983). In applying this principle, Mississippi courts have been extremely reluctant to separate siblings. *Owens v. Owens*, 950 So.2d 202, 206 (P11) (Miss. App. 2006). In the cases where the separation of siblings has been affirmed, the unusual and compelling circumstances relied on to overcome this presumption have often been of some magnitude. *Sootin v. Sootin*, 737 So.2d 1022, 1027 (P15) (Miss. App. 1998). To overcome this presumption the party seeking to separate siblings must introduce sufficient evidence as to how the proposed separation would

affect each sibling. *Staggs v. Staggs*, 919 So.2d 112, 118-19 (P24-P27) and 120 (P33) (Miss. App. 2005).

The following is a review of recent cases in which the presumption was not rebutted and it was found to be in the best interest of siblings that they not be separated:

In *Owens v. Owens*, supra., at 206-207 (P9–P16), the appellant alleged that the chancellor had erred in not splitting custody of siblings because he placed undue influence on the Sparkman principle and treated it as an overriding concern. However, the Court of Appeals affirmed the chancellor in keeping the siblings together. The Court of Appeals found that the chancellor had properly addressed all of the Albright factors and had also considered the Sparkman presumption as an additional factor in determining the children's best interest. The Court of Appeals noted that Mississippi courts have been extremely hesitant to separate siblings, and that the Sparkman presumption requires that they stay together unless the party seeking to separate them meets the burden of proving unusual and compelling circumstances that make it in the children's best interest to be separated. The Court of Appeals found that the chancellor had not committed error by stating that he had relied heavily on the Sparkman presumption.

In *Sootin v. Sootin*, supra., at 1026-1028 (P12-P15), the Court of Appeals reversed the chancellor's decision to separate the custody of two siblings in the absence of sufficient evidence of unusual or compelling circumstances to justify their separation. The Court of Appeals relied on the Supreme Court's holding in *Sellers v. Sellers*, 636 So.2d 481, 484-85 (Miss. 1994), that it is not in the best interest of children to be separated in the absence of unusual and compelling circumstances dictating that they should be separated. The Court of Appeals analyzed applicable Supreme Court decisions and determined that the Supreme Court only affirmed chancellors' decisions to separate siblings where the unusual and compelling circumstances pointing toward separation were substantial or of magnitude.

In *Staggs v. Staggs*, supra., at 118-120 (P24-P33), the Court of Appeals upheld the chancellor's decision to keep siblings together. The appellant (father) asserted that the evidence was overwhelming that it was in one child's best interest to live with him. The Court of Appeals disagreed finding substantial evidence that the mother (appellee) took good care of the three children. The Court of Appeals took special note that the father (appellant) had introduced no evidence regarding how the granting of custody of the one child to him would affect the other siblings.

In *Massey v. Huggins*, 799 So.2d 902 (Miss. App. 2001), the appellant alleged that the chancellor had applied an erroneous legal standard in allowing the children to stay together by allowing one child's preference to control his decision. The Court of Appeals found that the chancellor had properly evaluated all of the Albright factors, and had also properly considered the preference for keeping siblings together as an additional reason in determining the best interest of the children. *Massey v. Huggins*, supra., at 908 (P20).

Dr. Marshall's contention that the Chancellor did not properly apply the legal principle stated in *Sparkman v. Sparkman*, supra., is based on the Chancellor's following comment:

> In any event, I know it has caused you a lot of anxiety; I'm not going to remove custody from you, so you can rest easy on that. The main reason outside of the Allbright factors is that the case law prohibits a judge from separating siblings as is your case; you have two children and the law prefers that siblings stay together, which, of course, would be impossible to do by removing one from your home. (Transcript; the Court, page 147, lines 3-10)

By taking this statement out of context and focusing on the phrase "...the case law prohibits a judge from separating siblings as is your case..." Dr. Marshall argues that the Chancellor rendered his decision on the erroneous legal principle that there is a *per se* rule against the separation of siblings. However, the statement could just as easily be interpreted as meaning that the Chancellor had determined that Dr. Marshall had failed to rebut the presumption that siblings should remain together.

The Chancellor's statement was made after the close of evidence. (Transcript; Mr. Evans and the Court, page 146, line 14 – page 147, line 10). Therefore, this is not a case where a chancellor indicated prior to the close of evidence that he would rule in a certain way. *Horn v. Horn,* 909 So.2d 1151, 1158 (P18) (Miss. App. 2005); citing *Morgan v. West*, 812 So.2d 987, 996 (P32) (Miss. 2002)

Dr. Marshall, if he considered this comment error, had a duty to make a contemporaneous objection stating why he considered it to be error. By failing to do so, he waived any right to claim this comment as error in this appeal. *Horn v. Horn*, supra. at 1158 (P18); citing Miss. R. Evid. 103 (a)(1) and *Moore v. Moore*, 558 So.2d 834, 840 (Miss. 1990).

In order to properly ascertain the Chancellor's meaning, the comment must be considered in the context in which it was made. *Horn v. Horn*, supra., at 1158 (P18). The Chancellor's comment was made at the end of a long day of testimony after all parties had finally rested. (Transcript; Mr. Evans and the Court, page 146, lines 14-16)

The Chancellor's entire comment is as follows:

> MR. EVANS: We rest finally.
>
> THE COURT: Well, it's getting late, 4:15, and we've been going at it all day. What I'm going to do I'm going to spare Judy and not give an opinion, since she's been working all day. She does all the work here, you know, the court reporter. I will give a written opinion.
>
> I've already made up my mind, but I will give a written opinion setting forth the facts and circumstances for a couple of reasons. One is because it is a custody case, and you have to make a record in a custody case of certain factors which are set forth in case law when you're making a determination of custody. And I've considered each one of those factors already, but I'm going to make a written finding instead of dictating to the court reporter to save her that trouble of transcribing the opinion.
>
> In any event, I know it has caused you a lot of anxiety; I'm not going to remove custody from you, so you can rest easy on that. The main reason outside of the Allbright factors is that the case law prohibits a judge from separating siblings as is your case; you have two children, and the law prefers that siblings stay

> together, which, of course, would be impossible to do by removing one from your home.
>
> In any event, I know that's caused you some anxiety; I know you've had anxiety because you felt like she tried to keep the children, and I can assure you that isn't going to happen either; and I'm going to take into consideration – when I do this visitation schedule, I'm going to take into consideration all the requests that you've made as far as being able to see your children for extended times, both your children. And, of course, the older your youngest one gets, you'll have extended time with him as well.
>
> But in any event, I will issue an opinion. In the meantime we'll just keep the temporary order in place with the visitation and support. If I do make adjustments on the support after I review these financials, then we'll adjust it not for the September payment, but I will adjust it for the October payment. In other words, if I make it less than the 1200, you can make that adjustment in October; if I make it more, you can adjust it in October.

(Transcript; Mr. Evans and the Court, page 146, line 14 – page 148, line 2)

As can be seen from the entire comment, the Chancellor had already heard all of the evidence, had already weighed and applied the Albright factors to that evidence, had considered the legal preference that siblings stay together in the absence of exceptional circumstances, and had already reached his decision that it would be in the best interest of the children in this case that they remain together. The Chancellor could at that time have dictated his detailed opinion to the court reporter, but in deference to the hard day of work she had already put in, the Chancellor chose to give his detailed written opinion at a later time. The parties were obviously distraught and anxious in anticipation of the Chancellor's decision regarding custody, and the Chancellor, correctly and humanely, advised the parties at that time what his decision was on the issue of custody to spare them both additional needless anxiety. (Transcript; the Court, page 147, lines 3-21) The Chancellor did not render any judgment at that time. Rather he left the July 20, 2006, temporary order in effect as to custody, visitation and support until such time as he rendered his written opinion and final judgment. (Transcript; the Court, page 147, line 22 – page 148, line 2)

When the Chancellor did render his written opinion and final judgment on October 6, 2006, it was evident therefrom that he had correctly applied all applicable legal principles including the principle stated in *Sparkman v. Sparkman*, supra. (Appeal Record; Final Judgment, pages 57-66; and ARE, pages 3-12) He carefully considered each of the Albright factors and properly applied them to the evidence. (Appeal Record; Final Judgment, pages 59-60; and ARE, pages 5-6) He also considered as an additional factor the legal presumption that it was in the siblings' best interest to keep them together in the absence of evidence of exceptional circumstances to rebut that presumption, and he correctly determined that the evidence was not sufficient to rebut that presumption. (Appeal Record; Final Judgment, page 60; and ARE, page 6) In determining that it was in the best interest of the two children that they remain in the custody of their mother, Ms. Harris, subject to visitation rights on the part of Dr. Marshall, the Chancellor properly considered all of the above factors. (Appeal Record; Final Judgment, page 61; and ARE, page 7)

If the Chancellor committed any error when he made the aforesaid comment after the close of evidence, it was waived and rendered harmless when the Chancellor rendered his written opinion and final judgment which clearly showed proper application by the Chancellor of all applicable legal principles. *Morgan v. West*, supra., at 995-96 (P32-P33).

II. WHETHER THE LOWER COURT UNDULY CURTAILED THE EXERCISE OF APPELLANT'S VISITATION WITH THE MINOR CHILDREN

Ms. Harris had been having a difficult time agreeing with Dr. Marshall regarding visitation with the two minor children. She urged the Court to grant a standard visitation schedule that would set out Dr. Marshall's visitation rights as definitely as possible. (Transcript; Likitha Harris, page 71, line 26 – page 72, line 15 and page 110, lines 10-25)

Nowhere in the Court's comment at the close of evidence (Transcript; the Court, page 146, line 15 – page 148, line 2), in the Court's Final Judgment (Appeal Record; Final Judgment pages 57-66; and ARE, pages 3-12), or elsewhere in this record does it state that the Court was granting liberal visitation rights to Dr. Marshall. Rather, the visitation schedule (Appeal Record; Visitation Schedule, pages 64-66; and ARE, pages 10-12) awards Dr. Marshall weekend visitation during the school year with both of the minor children every other weekend from Friday on 5:00 p.m. until Sunday at 5:00 p.m., alternating holiday visitation and visitation with the minor children for the entire month of July each year.

Dr. Marshall complains that he was not granted five (5) weeks of summer visitation each year and also complains that he is not allowed visitation with the minor children on weekdays during the school year.

In arranging visitation schedules, the chancellor's paramount concern must be the best interest of the children. A chancellor's decisions regarding visitation are afforded great deference by the Appellate Courts. *Horn v. Horn*, supra. at 1161 (P38)

Dr. Marshall, citing *Chalk v. Lentz*, 744 So.2d 789, 792 (P 9) (Miss. App. 1999), alleges that the Chancellor abused his discretion regarding visitation by not granting him a minimum of five weeks of summer visitation with the minor children. However, *Chalk v. Lentz*, supra., does not mandate five-week summer visitation for non-custodial parents. Rather it allows the chancellor to fashion such visitation schedule as he determines to be in the best interest of the children. *Horn v. Horn*, supra. at 1162 (P. 39).

Dr. Marshall was awarded the entire month of July every summer with both of the minor children. July is a 31-day month. A week is seven (7) days. Therefore the month of July is four (4) full weeks plus an additional three (3) days. The summer visitation awarded to Dr. Marshall is only four (4) days short of five (5) weeks.

Dr. Marshall also apparently seeks visitation with the minor children on weekdays during the school year. This would be more akin to split custody than liberal visitation, and would not be in the best interest of the minor children. Dr. Marshall has one child in his custody in school in Jackson and the other child in his custody in school in Port Gibson. Dr. Marshall works full time in Port Gibson and divides his leisure time more or less equally between Jackson and Port Gibson, hiring others to care for the child in Port Gibson when he is in Jackson and to care for the child in Jackson when he is in Port Gibson. This hectic schedule does not provide a stable life for minor children. (Transcript; Demetri Marshall, page 14, line 16 – page 15, line 18, page 22, line 1 – page 25, line 2; page 28, line 3 – page 29, line 9; page 46, lines 9-22, page 50, line 11 – page 53, line 24; Likitha Harris, page 67, lines 4-13, page 86, line 28 – page 87, line 19, and page 95, line 20 – page 96, line 14) In awarding custody of the minor children to Ms. Harris and in setting Dr. Marshall's visitation rights, the Chancellor was mindful of Ms. Harris's more stable home and schedule and found this to be in the best interest of the minor children. The Chancellor sought to avoid the ping-ponging back and forth between Port Gibson and Jackson that Dr. Marshall practices with the minor children who are in his custody. (Appeal Record; Final Judgment, pages 57-66; and ARE, pages 3-12)

The Chancellor stayed well within the considerable discretion and deference granted to him by the Appeals Courts in setting the minor children's visitation schedule in such manner as he found to be in the children's best interest.

III. WHETHER APPELLANT SHOULD BE REQUIRED TO PAY APPELLEE'S ATTORNEY FEES AND COST IN DEFENDING THIS APPEAL

See Appellee's Motion for Attorney Fees which is incorporated herein by reference for all purposes.

This is a paternity, also known as bastardy, proceeding initiated by Complaint to Establish Paternity and Support filed herein by Ms. Harris. In her Complaint, Ms. Harris prayed that Dr. Marshall be adjudged the father of her two illegitimate children, that he be required to provide support for them, and that he be required to pay her attorney fees and cost in bringing this action. (Appeal Record; Complaint to Establish Paternity and Support, pages 1-4)

Ms. Harris established that she had hired her attorney at the rate of $90.00 per hour plus expenses and had paid him a retainer in the amount of $1,150.00. She introduced into evidence, without objection from Dr. Marshall, her attorney's itemized bill (which did not include the day of trial on August 25, 2006) showing fees incurred at $90.00 per hour in the amount of $1,450.00 and expenses in the amount of $305.04. (Transcript; Likitha Harris, page 108, line 29 – page 109, line 25) (Exhibit 9; invoice of Melvin H. McFatter through August 24, 2006, $1,790.04; pages 86-89) The final judgment entered in this cause by the trial court is an order of filiation, declaring Dr. Marshall to be the father of Ms. Harris's two minor children, requiring him to provide support and maintenance for said children, and requiring him pursuant to Miss. Code Ann. §93-9-45 to pay $2,000.00 to Ms. Harris as a contribution toward her attorney fees. (Appeal Record; Final Judgment, page 57-66; ARE, 3-12)

In this appeal, Dr. Marshall did not challenge the trial court's award of attorney fees to Ms. Harris or the reasonableness of the amount thereof. However, in this appeal, Dr. Marshall has challenged the award of custody of the minor child, Malik, to Ms. Harris, and also seeks more extensive visitation rights with the minor children.

As a result of Dr. Marshall's appeal, Ms. Harris has been required to incur additional attorney fees in the defense of said appeal in the amount of $3720.69. See the affidavit attached as Exhibit A to Ms. Harris's Motion for attorney fees.

Dr. Marshall is a practicing physician who has been employed at the Claiborne County Family Health Center in Port Gibson continuously since 1987. (Transcript; Demetri Marshall, page 3, line 22 – page 4, line 1; and page 47, lines 13-23) Ms. Harris is employed as a licensed practical nurse. (Transcript; Likitha Harris, page 94, lines 21-23) Ms. Harris is employed and is not wholly unable to pay her attorney fees. However, Dr. Marshall has substantially more income than Ms. Harris and is in substantially better financial condition. (Exhibit 3, Dr. Marshall's 2005 Federal income tax return, pages 13-20; Exhibit 4, Dr. Marshall's pay records from Claiborne County Family Health Center, pages 21-28; Exhibit 5, Ms. Harris's 2004 Federal income tax return, pages 29-51; Exhibit 6, Ms. Harris's 2005 Federal income tax return, pages 52-74; and Exhibit 7, Ms. Harris's pay check stub for the pay period ending August 4, 2006, page 75)

Where, as in this case, the trial court has made an order of filiation, declaring paternity of illegitimate children and providing for their support and maintenance, an award to the Petitioner of her reasonable attorney fees is mandatory. Miss. Code Ann. §93-9-45; *Dobbins v. Coleman*, 930 So.2d 1246, 1251 (P 25) (Miss. 2006); and *Clark v. Whiten*, 508 So.2d 1105, 1108 (Miss. 1987). The obvious purpose of this statute is to promote as public policy the determination of paternity for illegitimate children and to establish the father's legal obligation for the support of such children. Nowhere in the statute is the mandatory award of reasonable attorney fees restricted to the trial court. Where, as here, the father, Dr. Marshall, is in substantially better financial condition than the mother, Ms. Harris, it would defeat the purpose of the statute unless it is also interpreted to require mandatory award of attorney fees upon successful defense of the order of filiation declaring paternity and providing for support and maintenance of the minor children.

It is customary for the appellate court, upon successful defense of an appeal in domestic cases where the trial court awarded or should have awarded attorney fees, to allow the successful appellee one-half of the amount of attorney fees which the trial court awarded or should have awarded. *Schilling v. Schilling*, 452 So.2d 834, 836 (Miss. 1984); *Stauffer v. Stauffer*, 379 So.2d 922, 924-25 (Miss. 1980); and *Spradling v. Spradling*, 362 So.2d 620, 625 (Miss. 1978).

Where, as here, the appeal is frivolous, an award of reasonable attorney fees for defending the appeal is mandatory. Miss. App. P 38 and *Durr v. Durr*, 912 So.2d 1033, 1041 (P 30) (Miss. App. 2005). A claim or defense is frivolous or without substantial justification "...only when, objectively speaking, the pleader or movant has no hope of success." *Norton v. Norton*, 742 So.2d 126, 132 (P 27) (Miss. 1999). As more specifically set out hereinabove in Appellee's Brief in response to Issues I and II, Dr. Marshall's appeal is frivolous as he has no objective hope of success with regard to the two issues raised by him. Dr. Marshall's contention that the trial court applied an erroneous legal standard is based on a remark made by the trial court to which Dr. Marshall made no contemporaneous objection, and at which time the trial court made no ruling but continued its temporary order of custody. The trial court's written opinion and final judgment made it absolutely certain that the trial court had applied the correct legal standard. Also, Dr. Marshall's contention that the substantial amount of visitation awarded to him with the minor children was an abuse of the Chancellor's discretion, is likewise frivolous due to the substantial visitation awarded and the Chancellor's broad discretion in the area of establishing visitation.

CONCLUSION

Based on the foregoing arguments and authorities, the Appellee, Likitha Harris, prays that this Court will:

I. Affirm the Chancery Court's award of custody of the minor child, Malik Marshall, to the Appellee, Ms. Harris;

II. Affirm the Chancery Court's award to Appellant, Dr. Marshall, of visitation with the minor children, Malik Marshall and O'Naja Marshall; and

III. Require Dr. Marshall to pay to Ms. Harris her reasonable attorney fees in defending this appeal, either in the amount of $3,720.69, as shown by affidavit of her attorney, or in the amount of $1,000.00, being one-half of the attorney fees allowed by the trial court, based on one or more of the following reasons:

(a) Miss. Code Ann. §93-9-45 requires an award of reasonable attorney fees to Ms. Harris on affirmation of the order of filiation and support on appeal.

(b) In this domestic case where an award of attorney fees by the trial court is affirmed, additional fees incurred by that party in defending against the appeal are proper.

(c) Dr. Marshall's appeal is frivolous and Ms. Harris is entitled to attorney fees for defending this appeal and double costs.

RESPECTFULLY SUBMITTED, this the 25th day of July, 2007.

LIKITHA HARRIS,
Appellee

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of the Appellee's was this day delivered to the following individuals by first class United States mail, postage prepaid at the addresses indicated:

Hon. Jessie Evans
P. O. Box 528
Canton, Miss. 39046
Attorney for Appellant

Hon. George Ward
Chancellor
P. O. Box 1144
Natchez, Miss. 39121
Trial Judge

SO CERTIFIED this the 25th day of July, 2007.

MELVIN H. MCFATTER