

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-00599

AMY NICOLE WILLIAMS

RESPONDENT/APPELLANT

v.

MARCUS SHANE STOCKSTILL

PETITIONER/APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF PEARL RIVER COUNTY, MISSISSIPPI**

Civil Action File No. 05-0229 GN-D

**BRIEF OF APPELLEE
MARCUS SHANE STOCKSTILL**

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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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Amy Nicole Williams, Appellant
2. Hon. William E. Andrews, III., Attorney for Appellant
3. Hon. Candace L. Rickman, Attorney for Appellant
4. Marcus Shane Stockstill, Appellee
5. Hon. Richard C. Fitzpatrick, Attorney for Appellee
6. Honorable Sebe Dale, Jr., Chancellor below

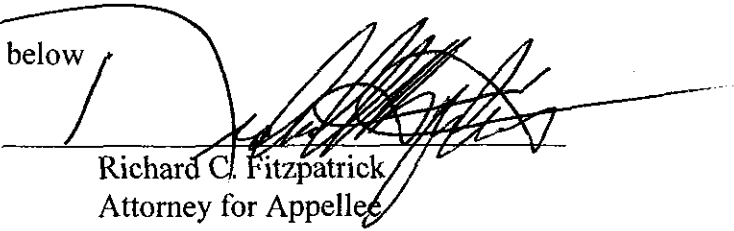

Richard C. Fitzpatrick
Attorney for Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	15
ARGUMENT	15
A. Standard of Review	15
B. The Albright Factors Were Properly Applied to This Initial Custody Determination	15
C. Amy Nicole's References to Facts and the Record in Her Brief Do Not Comply With the Law	24
D. The Chancellor's Decision is Properly Supported by A Full Analysis of the Albright Factors	28
CONCLUSION	34

TABLE OF AUTHORITIES

Cases

<i>Brewer v. Brewer</i> , 919 So. 2d 135 (Miss. App. 2005)	33
<i>Buchanan v. Buchanan</i> , 587 So. 2d 892 (Miss. 1991)	33
<i>C.W.L. v. R.A.</i> , 919 So.2d 267 (Miss. Ct. App. 2005)	19-22
<i>Copeland v. Copeland</i> , 904 So. 2d 1066 (Miss. 2004)	29, 31
<i>Crosby v. Triplett</i> , 195 So. 2d 69 (Miss. 1967)	16, 17
<i>In re Custody of M.A.G.</i> , 859 So.2d 1001 (Miss. 2003)	15, 24, 34
<i>Law v. Page</i> , 618 So. 2d 96 (Miss. 1993)	16, 18-22, 28
<i>Mabus v. Mabus</i> , 890 So. 2d 806 (Miss. 2003)	15, 24
<i>Norman v. Norman</i> , No. 2005-CA-00882 -COA, 2007 Miss. App. LEXIS 505 (Miss. Ct. App. Aug. 7, 2007)	33
<i>Romans v. Fulgham</i> , 939 So. 2d 849 (Miss. Ct. App. 2006)	16, 19, 22, 23, 29, 31-33
<i>S.B. v. L.W.</i> , 793 So.2d 656 (Miss. Ct. App. 2001)	19, 20
<i>Sellers v. Sellers</i> , 638 So. 2d 481(Miss. 1993)	21
<i>Smith v. Watson</i> , 425 So. 2d 1030 (Miss. 1983)	16, 20
<i>Sparkman v. Sparkman</i> , 441 So. 2d 1361 (Miss. 1983)	21

Rules

M.R.A.P. 28	25
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Other Authorities

<i>Black's Law Dictionary</i> (6 th ed.)	17
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STATEMENT OF THE ISSUES

- I. Did the Chancellor err in applying the Albright factors for initial custody determinations to this matter?
- II. Do Appellant's references to facts in her brief comply with the Mississippi Rules of Appellate Procedure and the standard of review?
- III. Was the Chancellor's decision in awarding primary physical custody to Shane Stockstill supported by a proper statement of the Albright standard and substantial credible evidence in the record?

STATEMENT OF FACTS

Shane and Tonya Stockstill were married in March of 1999. In early 2002, Tonya became pregnant with twins. Shortly after the birth of the twins, they separated for about a year when Tonya learned Shane had an affair with Amy Nicole Williams. Shane and Tonya reconciled after a one year separation from December 2002 to December 2003. (T.17-18, 22, 40; AERE-34-35, 39, 52)¹ During this affair, which lasted several months, Amy Nicole became pregnant with MJWS. (T. 6; AERE-25) In September of 2003, genetic tests were done which established Shane was in fact MJWS' biological father. (R. at 5, 33)

From the time of her birth until instituting these proceedings, Shane saw MJWS many times but was unable to sustain continuous regular visitation. He saw her at least twice in the first two months after her birth. Then he tried to work out an informal visitation schedule with Amy Nicole, but it did not work well. She testified that Shane was "getting her every Tuesday

¹R. will be used to refer to the record, T. to the trial transcript, Exhibit to the Trial Exhibits, RE. to Appellant's Record Excerpts, and AERE to Appellee's Record Exhibits.

and Wednesday or Wednesday and Thursday” until he missed three weeks and she denied him visitation on Father’s day of 2004.² He testified he saw MJWS some during the week and some on weekends, but he was not satisfied with the visitation he was getting. Shane testified when he told Amy Nicole that he was reconciling with his wife, Amy Nicole told him she was not going to allow him to see MJWS any more. Quite a bit of friction developed over this disagreement resulting in Shane not seeing MJWS for several months. Eventually Amy Nicole did allow him to see MJWS again. (T. 25, 41-42, 53-54, 69; AERE-42, 53-54, 63-64, 69)

In the first two years of MJWS’ life, Shane wrote at least two checks totaling \$1000 to Amy Nicole and gave her additional cash to help with MJWS’ support. Amy Nicole and Shane both testified that prior to these proceedings, Shane provided about \$150 a month in informal child support for MJWS. (T. 12, 25, 42; AERE-30, 42, 54)

Between the birth of MJWS and the institution of these proceedings in April of 2005, Shane sought counseling in making the right decisions concerning his marriage and his responsibilities toward all his children. (Exhibit 7; AERE-16)³ In April of 2005, Shane filed these proceedings, naming Amy Nicole and the Mississippi State Board of Health as defendants, initially seeking to establish paternity, amend MJWS’ birth certificate, to obtain regular visitation, and to establish regular child support payments. (R. 4-9) Although the title of the petition did not mention custody, Shane did seek joint legal custody along with liberal visitation

²The context of the testimony indicates it had to have been Father’s day of 2004 as it was clearly before the filing of these proceedings in April of 2005 and the temporary custody and visitation order of May 2005 and MJWS was born in July of 2003.

³The parties stipulated in the pre-trial order that the reports of Dr. Galloway and Dr. Tramontana would be admitted into evidence without objection and without the necessity of either appearing at trial. R. 60

in paragraph 9 of the petition. (R. 7) The petition also requested an immediate hearing to address temporary custody, visitation and child support pending final resolution of these issues. (R. 7, ¶ 13)

On May 16, 2005, after a conference with both Shane and Amy Nicole present, the Chancellor found Shane was MJWS's biological father and that her name and birth certificate should be revised. (R. 18; RE 4) The Chancellor also set a trial date of August 18, 2005 and entered a temporary custody, visitation and support order granting Shane and Amy Nicole joint legal custody with Amy Nicole having primary physical custody subject to a standard visitation schedule and setting Shane's child support obligation at \$150 a month pending final resolution of custody, visitation and support issues after a full trial. Shane was also required to provide medical insurance for MJWS. The Chancellor also appointed John Pat Galloway as a court appointed specialist at Shane's expense and ordered both parents to receive parental counseling from Dr. Galloway. (R. 18-23; RE 4-9)

Following the temporary order, Shane continued to pay \$150 a month in support for MJWS. (T. 12, 42; AERE-30, 25) Once the Chancery Court issued a temporary order granting Shane visitation, MJWS has been with Shane, Tonya and their twins regularly. (T. 19; AERE-36) But despite frequent visitation in which MJWS became comfortable enough in Shane's home that she has adopted the twins habit of calling Tonya "mama," things did not go smoothly between the parties following the May 2005 order. (T. 19; AERE-36)

On August 4, 2005, Dr Galloway reported to the Chancellor on his evaluation of the Stockstills. He reported that they were receiving counseling from Dr. Beverly Stubblefield and had resolved many of their problems over Shane's affair and the birth of MJWS. He reported

there was strain between the couple and Shane's family over their decision to reconcile and start their own business, but that they were working on that strain. Dr. Galloway reported Shane was committed to his wife and family and there were no negative pathologies that he or Dr. Stubblefield had observed. On the other hand, he reported Amy Nicole had not kept her appointment and was uncooperative in rescheduling so there was nothing further he could do. (Exhibit 10; AERE-23-24) Noting Dr. Galloway's report of Amy Nicole's failure to keep her appointment, on August 15, 2005, the Chancellor decided to continue the August 18, 2005 trial date to December 20, 2005. (R. 29)

By this point, Shane had become concerned about the living conditions being provided for MJWS with Amy Nicole. Amy Nicole had moved four or five times since MJWS' birth. During one of the periods, she had her daughters living with her and her boyfriend in a house where drugs were present. As a result of drugs being found in the house, Amy was arrested for possession of cocaine. In June of 2005, Amy Nicole was indicted on these criminal charges. Shane later told the court appointed specialist that he was concerned about both the arrest for drug charges and an arrest for commercial burglary. (Appt. Brief p. 2; Exhibits 5 & 12; T. 45-46, 71; AERE-7, 12-13, 56-57)

On September 26, 2005, noting that there was no objection from the State Board of Health and that Amy Nicole had entered an appearance pro se but not filed an answer, the Chancellor granted Shane's motion to file amended pleadings. (R. 31) On September 30, 2005, he filed an amended petition alleging Amy Nicole's failure to cooperate with the court's orders in regard to Dr. Galloway, that Amy Nicole was in contempt of the court's May 16, 2005 order, and that Amy Nicole was harassing Shane and his family. The amended petition sought sole legal

and physical custody for Shane, visitation for Amy Nicole as the court saw fit, and appointment of a Guardian ad Litem for MJWS. (R. 32-40) The State Board of Health filed an answer to the amended petition which stated that after investigation it did not deny any of the averments of the amended petition. (R. 41)

On December 7, 2005, Dr. Galloway reported to the court that he had seen Shane and his wife Tonya and was following their progress with Dr. Stubblefield. He reported that Amy Nicole had shown up for a rescheduled appointment at his office, but left immediately when she encountered the Stockstills in the waiting room. He stated that he had had no further contact from Amy Nicole and could not proceed further until he could evaluate her. (Exhibit 9; AERE-22)

On December 16, 2005, Amy Nicole's attorney entered an appearance and requested another trial continuance stating he had been retained on December 14 and that he had a prior conflict on December 20, 2005. (R. at 43-46) Shane objected to the continuance as trial had already been continued once because of Amy Nicole's failure to comply with the Chancellor's order. (R. 47)

On December 20, the Chancellor continued the trial without setting a new date. (R. 50)

On March 18, 2006, Dr. Galloway reported to Chancellor Dale that he had seen Amy Nicole twice in the first week of January. According to Dr. Galloway, Amy Nicole reported to him that MJWS got along well with her twin siblings at Shane's home. Amy Nicole had no problems with the way MJWS was treated in Shane's home or with Shane and his treatment of MJWS. She thought Shane had a good relationship with MJWS. However, Amy Nicole reported considerable friction between herself and Shane's wife. She admitted to Dr. Galloway that she had physically assaulted Shane's wife resulting in Amy Nicole's arrest for assault. Dr. Galloway recommended to the court that visitation be restructured in a manner that would

minimize contact between Amy Nicole and Tonya as he did not believe it was possible to reduce the friction and animosity between them. He also recommended that Amy Nicole undergo counseling. (Exhibit 8; AERE-20-21)

On March 31, 2006, Amy Nicole entered a guilty plea to possession of controlled substances as a result of her cocaine arrest and was sentenced to 3 years house arrest and 7 years probation plus a fine. The burglary charges were dismissed upon her payment of 1/3 restitution and court costs. (R. 60, Exhibits 5 and 12; AERE-7-10, 12-15)

On May 11, 2006, Dr. Galloway sent his fourth and final report to Chancellor Dale. He had then conducted home visits with both Amy Nicole and Shane and had conversations with Dr. Stubblefield. Dr. Galloway reported that according to Dr. Stubblefield, Shane and Tonya Stockstill had made remarkable progress in counseling, having resolved the anger between them and moved on to work together for MJWS's best interests. Dr. Stubblefield indicated that they involved MJWS in their family life completely and that MJWS had developed strong relationships with both Shane and Tonya and also with her twin siblings. They are truly concerned about MJWS, are mature, capable of being good parents for MJWS and can provide MJWS with physical, emotional and spiritual security. Based on his home visit, Dr. Galloway was in complete agreement with Dr. Stubblefield concerning the suitability of Shane and his wife having primary custody of MJWS. (Exhibit 7; AERE 16-19)

On the other hand, Dr. Galloway reported Amy Nicole's life was in a state of flux with considerable problems. While she and her parents and relatives were all capable of taking care of MJWS, Amy Nicole had much to do to get her life in order. Because of her troubles with the law, Amy Nicole had too many court dates to be able to keep her job in the Katrina recovery

work. Taking care of MJWS and dealing with legal matters related to the criminal charges against her, occupied Amy Nicole full time leaving little time for employment. Because of her legal problems and lack of employment, Amy Nicole has not been able to get out of the physical surroundings that had kept her in a limited position for quite some time. He found the Stockstill's home environment more conducive to parenting MJWS at the present. However, he concluded by recommending that the court obtain another independent evaluation because of the course of his long involvement in the case which might color his viewpoint. (Exhibit 7; AERE 16-19)

On May 30, 2006, Chancellor Dale appointed Dr. Joseph Tramontana to investigate the issues concerning the best interests of MJWS and her relationships with her parents. He also rescheduled trial once again to September 14, 2006. (R, 56-58) Dr. Tramontana, a psychologist, evaluated Amy Nicole, Shane, Tonya, and MJWS and also talked briefly with some other witnesses on August 18, 2006. In his report back to the court that Shane was a well functioning individual of average intellect with average academic achievement and no psychological problems. He noted no problems of any sort, and specifically noted a low risk of developing any sort of substance abuse or dependency. (Exhibit 5; AERE-2-6)

On the other hand, he diagnosed Nicole as having obsessive compulsive personality disorder with narcissistic personality traits, and schizoid and histrionic personality traits. He pointed out that he asked Nicole if she had ever been arrested, her response was "Which time?" She admitted to him that she had been arrested once on commercial burglary and drug charges and another time for simple assault. She admitted to be on house arrest and that she would be getting an electronic monitor in connection with the burglary and drug charges. He pointed out

that she had never been married and had two children out of wedlock. (Exhibit 5; AERE-7-10, 13-15)

Dr. Tramontana's analysis of the psychological testing he administered to Amy Nicole was

[t]his woman's effort to be accommodating yet admirable leads her to seek other who possess considerable power and control, persons or institutions that have status and respect, as she wishes to be seen. It is likely that she lacks much insight into both herself and others. Unless given clear guidelines as to what is and what is not correct and proper, she may become indecisive and easily upset. Deviations from her routines are highly anxiety-provoking. She has a degree of interpersonal alienation

In regard to substance abuse, he noted that Amy Nicole smoked a pack of cigarettes a day. In regard to testing to detect possibility of substance abuse, he noted that she responded in a way suggestive of invalid answers and that she was defensive in a way that might cause the testing to miss substance abuse. (Exhibit 5; (Exhibit 5; AERE-7-10)

Dr. Tramontana concluded that Shane's evaluation presented a cleaner picture and he was clearly the more stable of the two parents. But he also concluded that many people are able to parent effectively with the sort of problems Amy Nicole had. In terms of MJWS's best interest, he ranked three possible custody alternatives. In his opinion, awarding Shane primary physical custody with Amy Nicole having visitation was the best choice. Because there appeared to be agreement on schooling, he thought that there was a possibility that joint physical custody with MJWS living half the time with each parent was a possibility. From the point of view of MJWS' best interest, he thought Amy Nicole having primary physical custody with Shane having regular visitation was the worst of the available options. (Exhibit 5; (Exhibit 5; AERE-13-15))

At the time of trial, on September 14, 2006, Amy Nicole was under house arrest based on

a March 31, 2006 conviction and sentence for possession of controlled substances. She was only permitted to leave home in order to go to work and to go to church. She had also been convicted of simple assault and was awaiting sentencing. (T. 12-13; AERE-30-31)

MJWS was three years old at the time of trial and generally in good health. (T. 13; AERE-31). From MJWS' birth, Amy Nicole's mother and step-father have helped her to care for her children. *Id.* For some of that period, Amy Nicole lived with her parents. At other times, she and MJWS lived with Amy Nicole's boyfriend and her brother. (T. 14; AERE-32) Amy Nicole's step father is retired from the phone company. Her mother had operated an answering service in her home but at the time of trial was in the process of selling her business. (T. 15; AERE-33)

Amy Nicole testified that Shane had a good relationship with MJWS and that Shane was a good father to MJWS. (T. 14; AERE-32) The local middle school assistant principal who had considerable contact with Shane, Tonya and Madison testified that when she was with Shane when he returned MJWS to Amy Nicole after visitation, MJWS would ask why she had to go back to stay with Amy Nicole. She would also ask where her brother and sister (the twins) are, if they are not with her in the car. The twins would do the same asking where MJWS was if she was not with them. MJWS seemed very comfortable and secure with Shane and Tonya and the twins and would want to stay with them. She testified MJWS was very happy and content, interacting well with Shane, Tonya and both her twin siblings. She testified that despite the friction of the situation, MJWS has developed a very strong relationship with Tonya, often clinging to her as a child of that age would to her mother. MJWS wants Tonya to read her a book or fix her hair for her. MJWS calls Tonya "mama" just as the twins do. The relationship

between Tonya and MJWS is the same as the relationship with the twins. (T. 30-32; AERE-44-46)

Shane also testified that MJWS and his twins are as close as the Three Musketeers. The twins constantly ask where their sister is when she is not with them. He also testified to the close relationship that has developed between MJWS and Tonya, corroborating the testimony of both Tonya and the school assistant principal. (T. 44; AERE-55)

At the time of trial, Shane and Tonya were expecting another child. They had purchased their own convenience store. Tonya has a flexible work schedule in handling the payroll and billing. She either works when the twins are in preschool or her mother or her aunt cares for the children when she needs to work a shift. They were planning to set up the computer so that she could do payroll and bookkeeping from home after the birth of the youngest child so that she can stay at home with all the children including MJWS. (T. 17-18, 20-21; AERE-34-35, 37-38)

When MJWS first began visiting Shane's home, she was often sick, having problems with asthma when she would arrive at his home. During the time this case has been pending, her asthma has been diagnosed and is being treated and her health is good. (T 19; AERE-36)

Shane spends as much time as he can with MJWS during her periods of visitation in his home. They spend a lot of time together outside, playing on the trampoline, and riding as well as playing in the swimming pool or the creek often with the twins. Shane's activities with MJWS are very similar to his activities with the twins. (T. 19-20; AERE-36-37) Although Shane works long hours, he and his wife arrange things so that each of his children gets to spend time with him at the store which is not shared with the other children. (T. 28; AERE-43)

Amy Nicole has a high school education. (T. 7; AERE-26) She has worked as a cashier in

several locations and for a time as manager of a tobacco store. Her job as manager ended when she was accused of and pled guilty to burglarizing the store. In between these jobs and two stints at selling things on Ebay, she has worked intermittently as a cashier in several locations and doing cleanup work after Hurricane Katrina. At the time of trial (September 2006), she had been back working for a woman in her home at Hideaway Lake selling things on Ebay for about three weeks, working approximately 8 a.m. to 3 or 4 p.m. Monday through Friday. At the time of trial, she was also paying restitution for the burglary to the tobacco store. MJWS attends day care when Amy Nicole works. (T. 9-12; AERE-27-30)

Amy Nicole has two daughters, MJWS and BP. The two girls fathers are different. Amy Nicole does not have primary physical custody of BP. BP spends the majority of time including week nights with her father. She spends some afternoons after school and weekends with her mother. BP's father pays no child support. (T. 7, 14, 67; AERE-26, 32, 68)

Shane completed high school, and several years of college although he did not earn a college degree. During college and afterwards, he worked in several grocery and convenience stores, working his way up into managerial positions. Eventually he was promoted to supervising the managers of several convenience stores. Following his period of supervising managers of several convenience stores, he purchased a convenience store of his own which he now runs with his wife. Prior to purchasing his own store, he worked 7 am to 5 pm Monday through Friday and usually 8 am to 2 pm either Saturday or Sunday depending on what was needed. Since purchasing his own store, he usually has about 14 employees to staff it. At the time of trial he was short handed, so he usually was working about 5 am to 10 am on Saturday and for a couple of hours on Sunday in addition to 7 am to 5 pm on weekdays. (T. 37-39; AERE-

49-51) As a result of being so short handed at the store and his wife being ill in connection with the current pregnancy in her late 30's, Shane has recently missed taking advantage of a few of his regularly scheduled visitations with MJWS. (T.49-50; AERE-37-38)

Shane testified that his parents disagreed with his decision to reconcile with Tonya and the twins which created a great deal of strain between himself and his parents. He has not cut his children off completely from his parents. They come by the store to talk. But it will take time to heal the rift. At this point, while he would be willing to rely upon his grandmother to keep his children if help were needed for some reason, he would not rely on his parents to keep his children. It is his decision, not his wife's decision, that the children should be protected from his parent's view of his wife and their reconciliation. (T. 44-45, 56-57; AERE-30-31, 45-46)

The Chancellor took the matter under advisement and issued a written opinion on February 1, 2007 in which he recognized the pole star consideration of the best interest of the child and went through a detailed analysis of the Albright factors. He found both Shane and Tonya to be credible witnesses with a genuine desire for Shane to have primary responsibility for MJWS's care with the genuine support of his wife. He found the two parents to be roughly equal on a number of factors which favored neither Shane nor Amy Nicole. These included age of the child, health of the child. He found that only continuity of care prior to the proceedings favored Amy Nicole as she and Shane never lived together and Shane had not been the care provider for MJWS for any appreciable period of time prior to the first temporary order in these proceedings. (R. 71-77 ; RE 11-17)

He found the vast majority and a number of very important factors in terms of MJWS's best interest favored Shane, however. Employment and responsibility for employment favored

Shane because even though his business required many hours, his responsibilities and authority as owner gave him the flexibility to manage and apportion his time so that he was available to his children. Amy had little flexibility in her employment and as a single person it was difficult to make any sacrifices in her work for her children as it would have a negative impact on her finances which she could ill afford. He found that the health and age of the parents also favored Shane as the psychological examinations showed him to have greater maturity, discipline, and dedication than Amy. Shane's actions in seeking out counseling to repair and strengthen his marriage and the progress he had made in that regard showed substantial evidence of strong mental and emotional health. On the other hand, Amy Nicole's career and life demonstrated a lack of discipline, commitment and maturity. In particular, Chancellor Dale found that she demonstrated a lack of ability to make good choices for herself and her children, noting that her involvement in criminal activity weighed very poorly in regard to her general state of mental health and intellect. He found that while both parents had made mistakes in the area of moral fitness, Shane's behavior demonstrated substantial positive improvement. Amy's misdeeds, particularly her criminal behavior, was much more pronounced and she did not present evidence of positive improvement as Shane did. (R. 74-75 ; RE 14-15)

He also found that the emotional ties of parent and child favored Shane because it was quite remarkable how strong an attachment MJWS had developed for Shane in light of the limited time available to him in which to establish such a strong bond. Although he was not concluding that Amy or her family were necessarily at fault, he concluded that the stability of the home environment clearly weighed heavily in Shane's favor. As Chancellor Dale judged the evidence and the credibility of the witnesses before him, he found that Shane has a stable

marriage and family life while Amy does not, Shane has steady and reliable employment and financial status while Amy does not, and most importantly, Amy's future is clouded by the challenges she will face as a result of her erratic and criminal behavior and the consequences of that behavior while Shane's future appears positive. (R. 75 ; RE 15)

Accordingly, after weighing all the factors, Chancellor Dale decided that it was in MJWS's best interests to grant her parents joint legal custody with Shane having primary physical custody and Amy Nicole having liberal visitation. (R. 71-77; RE 11-17) Amy Nicole then filed a motion for reconsideration and/or new trial alleging the following grounds:

- a) the Chancellor's decision was contrary to the evidence and not in the best interest of the child
- b) that where the parties were never married and the parents had not lived together with the child, the court should recognize that defacto initial custody by the mother is established, should not apply the Albright factors as in initial custody determinations for divorce proceedings, and should hold the father to a higher standard for obtaining custody than a divorcing father who actually shared custody prior to the proceeding is held to, especially where the father waited three years to seek custody either because he didn't want custody or thought the mother should have custody;
- c) that the Chancellor was mistaken in his assessment that Shane and his wife were credible witnesses genuinely concerned with the welfare of MJWS;
- d) that the Chancellor failed to consider that the order would separate MJWS from her older half sister with whom she had lived all of her life since birth; and
- e) that the Chancellor failed to consider the effect of Tonya's influence in cutting off their children's relationship with Shane's family. (R. 81-84)

SUMMARY OF ARGUMENT

The Chancellor clearly followed controlling case law in basing his decision to grant Shane Stockstill primary physical custody of MJWS on a full consideration of the *Albright* factors as applicable on an initial custody determination. He applied the correct standard in putting Shane on equal footing with Amy Nicole because although MJWS is Shane's illegitimate daughter, Shane has acknowledged his paternity. There was no prior adjudication of initial custody which is a prerequisite for applying the standard for modification of custody. His analysis of the *Albright* factors and his determination that those factors tip the balance in favor of granting Shane paramount physical custody with both parents sharing legal custody and Amy Nicole having liberal visitation is supported by substantial credible evidence in the record and is not manifestly erroneous.

ARGUMENT

A. Standard of Review

The standard of review in child custody cases is a limited one. An appellate court will reverse a Chancellor's decision only if his decision is manifestly wrong, clearly erroneous, or he applied an erroneous legal standard. *In re Custody of M.A.G.*, 859 So.2d 1001, 1004 (P8) (Miss. 2003). The Chancellor is the sole judge of the credibility and weight of the witnesses and the evidence. *Mabus v. Mabus*, 890 So. 2d 806, ¶ 38 (Miss. 2003).

B. The Albright Factors Were Properly Applied to This Initial Custody Determination

The Chancellor's February 1, 2007 decision was an initial custody determination in which the polestar consideration of the best interests of the child was properly determined by applying the Albright factors starting with the two parents of this illegitimate child on a equal footing. It

would have been contrary to the law of this state to hold Shane to the higher standard of a material change in circumstances as argued by Amy Nicole. The arguments she makes in regard to what the applicable law should be were rejected in *Romans v. Fulgham*, 939 So. 2d 849 (Miss. Ct. App. 2006)⁴ as inconsistent with the decisions of our appellate courts and the law of our state.

Upon acknowledging paternity, the father of an illegitimate child stands on equal footing with the mother in regards to matters of parental and custodial rights. *Smith v. Watson*, 425 So. 2d 1030, 1033 (Miss. 1983)⁵; *Law v. Page*, 618 So. 2d 96, 101 (Miss. 1993). It is undisputed that by filing this action in April of 2005 to legally establish his paternity, Shane formally acknowledged his paternity of MJWS. *Crosby v. Triplett*, 195 So. 2d 69 (Miss. 1967)

⁴Appellants description of *Romans v. Fulgham* in the Conclusion of her brief on p. 11 is completely at odds with that decision. It even involves a father seeking to obtain custody from a grandfather. It holds:

In May of 1997, William Ryan Fulgham was adjudicated the natural father of A.F., a child born out of wedlock to Lisa Godin Romans on November 28, 1996. ... In September 2004, Ryan filed a petition in the Chancery Court of Lafayette County seeking primary physical custody of A.F. After a bench trial, the chancellor awarded Ryan primary physical custody of A.F., and awarded joint legal custody to both parents. ... On appeal, Lisa claims that the chancellor erred in treating the dispute as an initial custody determination, rather than as a custody modification proceeding; in the alternative, she claims that the chancellor erred in his application of the Albright factors. Finding that the chancellor appropriately treated the dispute as an initial custody determination, and that the chancellor's ruling was supported by substantial, credible evidence, we affirm the ruling of the chancery court. ... We maintain the appropriate standard is one of an initial custody proceeding utilizing an Albright analysis in order to determine the best interest of the child.

⁵In *Smith* the court ultimately found the father lost this equal footing by abandoning his daughter in her early years. He saw the child twice in her first year of life and his family provided some babysitting in the first eight months. From her second through her seventh year of life, the father never saw his daughter and contributed absolutely nothing to her support. This clearly constitutes abandonment, but it is not at all similar to the facts of the present case. 425 So.2d at 1034-1035.

establishes that a father may also acknowledge paternity in less formal ways such as by visiting a child, making statements to others recognizing the child as his daughter, by his words and acts showing his love for the child and his belief that the child is his daughter. *Crosby* discussion of acknowledgment and its reasoning shows that in the context of paternity, Mississippi law follows the definition of acknowledgment found in *Black's Law Dictionary*:

[r]ecognition of a paternal relation, either by a written agreement, verbal declarations or statements, by the life, acts, and conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted.

Black's Law Dictionary (6th ed.) p. 23.

Even taking the evidence as provided by Amy Nicole, Shane clearly engaged in words, acts and conduct from the first year of MJWS's life which recognized and admitted his paternal relationship to MJWS. She testified in that first year, prior to Father's Day of 2004, she and Shane had reached an agreement on visitation under which Shane was "getting her every Tuesday and Wednesday or Wednesday and Thursday" until he missed three weeks and she denied him visitation on Father's day of 2004. (T. at 69; AERE-69). Shane's recognition of the paternal relation is implicit in both their agreement that MJWS would spend every Tuesday and Wednesday or Wednesday and Thursday with Shane and that Shane asked to have her on Father's Day. His request for visitation on Father's Day is clearly an acknowledgment of the paternal relation.

But Amy Nicole's testimony concerning Shane's acknowledgment prior to filing this action does not stand alone. There is testimony that he told his wife Tonya that he was MJWS' father. (T. 23, 24; AERE-40, 41). There was also testimony about Shane making verbal statements that MJWS was his daughter and he wanted to continue seeing her when Amy Nicole

told him upon learning that he was reconciling with his wife that he could no longer see MJWS. (T. 54; AERE-64) There was also testimony that Amy came to the store where he was working in Pearl River during his separation from his wife and he gave her a \$500 check for financial assistance in supporting his daughter. (T. 42; AERE-52) When added to Shane's own testimony concerning his efforts to have visitation with his daughter and concerning the support which was asked for and which he provided prior to filing these proceedings, along with the testimony of all the witnesses as a whole in which everyone testified on the basis that Shane is MJWS's father, it is clear that he has acknowledged her at least since the September 2003 blood tests established his paternity. (See entire Transcript)

It is undisputed that there was no formal custody determination prior to the institution of these proceedings. (R. 4-8, 18-24, 32-38, 41) It is also clear from the original Complaint's request for a hearing on temporary custody, visitation and support and the order of May 16, 2005 which set an August 18, 2005 trial date for the matter, appointed Dr. Galloway as a specialist, and contains no mention of the Albright factors or any analysis of those factors that the custody, support and visitation provisions of that order were in the nature of a temporary order pending a full initial custody, visitation, and support determination after trial on the merits. (R. 7 at ¶ 13, 18-23; RE 4-9) *Law v. Page*, 618 So. 2d 96, 101 (Miss. 1993) makes it clear that in such circumstances, the *Albright* factors are to be applied in the same manner as they are in an initial custody determination upon divorce. *Law v. Page* specifically rejected the argument that the "material change in circumstances" standard should apply holding that the "'material changes" standard used in modification proceedings is dependent on there being a prior determination of custody." *Id.*

Romans v. Fulgham rejected the arguments made by Amy Nicole on facts which would be more likely to support the argument, if valid, than the facts of the present case. The child was born in November of 1996 and lived with the mother until the Chancery Court awarded the father physical custody sometime after September of 2004. The parents never lived together. In May of 1997, the Department of Human Services obtained a paternity judgment and a \$100 a month child support order against the father. The father took no action to obtain physical custody until the child was 2 months shy of his 8th birthday when the father sought primary physical custody. After a bench trial, the chancellor entered a final order granting the father primary physical custody with the parents sharing joint legal custody. The Court of Appeals affirmed the Chancellor's grant of primary physical custody to the father. *Id* at 851.

The *Romans* majority held that its decision was required by the prior decisions of *Law v. Page*, *supra*, *S.B. v. L.W.*, 793 So.2d 656 (Miss. Ct. App. 2001) and *C.W.L. v. R.A.*, 919 So.2d 267 (Miss. Ct. App. 2005). In *Law v. Page*, as in this case, the parents were never married. Sometime after a paternity test established he was the father, the father brought a paternity action when the child was a little less than a year old. After a trial nearly six months later, the Chancellor awarded custody to the father. On appeal, the Mississippi Supreme Court sent the matter back for "further inquiry" when the child was two years and three months old because the Chancellor had based his decision in part on matter occurring before the child's birth. The second trial occurred when the child was almost three years old. The Chancellor again applied the full initial Albright factors and based on the evidence at that time again found that the best interest of the child favored the father having primary custody. When the child was some four and a half years old, the Mississippi Supreme Court affirmed finding that at that time the proper

standard to apply was still the full initial *Albright* factors as there had not been a prior full and final initial judicial determination of initial permanent custody based on a full analysis of the child's best interests through a full *Albright* analysis.

In *S.B. v. L.W.*, the parents were never married. The mother moved out of the house she shared with the father while she was still pregnant with the child. Although the opinion mentions few specific dates, it is clear that the child was more than six when the father filed the action in which the Chancellor awarded him custody of his daughter as there was discussion of school arrangements. The father did not take legal action seeking custody until the mother indicated an intent to move from Lafayette County to the Gulf Coast even though the father was aware of the mother exposing the child to her bisexual orientation, lesbian lifestyle and her intimate relationship with another woman. Both the Chancellor and the Court of Appeals rejected the mother's argument that the modification of custody standard should be applied, finding instead that *Law v. Page* required the initial application of the *Albright* factors because there had been no prior judicial initial determination of custody based on a full consideration of the *Albright* factors. Both the Chancellor and the Court of Appeals also found that the analysis must start with the father on an equal footing with the mother under *Smith v. Watson*, 425 So. 2d 1030 (Miss. 1983) because the father acknowledged his paternity of the child.

In *C.W.L. v. R.A.*, the child was the product of an extramarital affair. When the child was approximately a year old, the mother filed a paternity action against the natural father with the assistance of the Department of Human Services. That action resulted in an adjudication of paternity and an award of child support against the father. The order also granted the father visitation. Over the years, the mother took the child with her when she moved to Florida with

her new husband and then brought the child back to Mississippi. When she moved again to Texas and took the child with her, the father filed a petition in May of 2002 styled “Complaint for Modification of Custody and Temporary Restraining Order” seeking physical custody of the child. The opinion does not state how old the child was at that point, but it is clear she was at least past the age for kindergarten and was attending school. The opinion states the Chancellor entered several orders before a full trial was held in July of 2003 when the Chancellor awarded physical custody to the father with liberal visitation for the mother applying the full *Albright* factors.

On appeal, the mother argued the Chancellor should have applied the modification standard for changing custody because the paternity action granted her de facto custody. The Court of Appeals rejected this argument pointing out that *Law v. Page* required a full application of the *Albright* factors as this was an initial custody determination since there had been no prior formal judicial determination of permanent custody applying the *Albright* factors. *Id* at ¶¶ 9–11. The court found the limited standard of review with deference to the Chancellor as the sole judge of the weight and credibility of the evidence applied and that the Chancellor had discussed the *Albright* factors and documented the basis for his findings. *Id* at ¶¶ 18–20. The Court also rejected arguments by the mother that the Chancellor should have considered the child’s relationship with her half-brother and not separated them. The Court pointed out “there is no general rule in this state that the best interest of siblings is served by keeping them together” citing *Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. 1993) and *Sparkman v. Sparkman*, 441 So.

2d 1361, 1362 (Miss. 1983)) *Id* at ¶ 21.⁶

The Court of Appeals found all of these cases applicable and controlling in *Romans v. Fulgham* where the father waited until the child was almost eight years old to seek physical custody despite an adjudication of paternity and child support when the child was only about six months old. The *Romans* court pointed out that the lack of the passage of time was not a factor in any of these decisions in deciding that the matter was an initial custody determination to which the full *Albright* analysis applied. In short, the *Law* decision clearly held that there is no such thing as de facto custody for purposes of deciding whether the court should apply the full *Albright* factors or the modification standard. It is the child's interests which are paramount and the child is entitled to one full and final initial judicial determination of custody applying the full *Albright* factors.

Even the dissent in *Romans v. Fulgham* acknowledged that *Law v. Page* holds that where there has been no prior judicial determination of initial permanent custody, "an original *Albright* analysis should be applied" rather than the modification of custody standard. *Id* at 856-857. Moreover, the dissent in *Romans* also recognized that there was no basis for distinguishing *Romans* from *C.W.L. v. R.A.* It follows there is no basis for distinguishing the present case from either *C.W.L.* or *Romans*. Amy Nicole discusses none of this relevant and controlling authority in

⁶Amy Nicole claims that the Chancellor did not even mention her older half sibling in Amy Nicole's household. The is not accurate. On page 4 of the opinion (R. 74; RE 14), the Chancellor noted that Amy Nicole is both unmarried and the mother of another child. Thus, he clearly recognized that MJWS had an older half-sibling in Amy Nicole's household. However, MJWS also has twin half siblings very close to her own age in Shane's household and there was abundant evidence establishing that she has developed a very strong bond with them. (Exhibits 7 & 8; T. 31-32, 44; AERE-16-21, 45-46, 55) Thus, there was reason for the Chancellor not to accord any extra weight to Amy Nicole on the basis of having a half sister in Amy Nicole's household.

her brief although the one inaccurate citation to *Romans* indicates an awareness of the existence of *Romans* and the case law cited in *Romans* when the brief was written.

Amy Nicole claims this case should be treated differently than the cases which hold that when a father acknowledges an illegitimate child as his own, Mississippi law puts him on equal footing with the mother in regard to parental and custodial rights because Shane did not recognize MJWS as his child until she was two years old and instead acted toward his daughter in a manner equivalent to abandoning her. (Appt. Brief p.6) Even if the controlling law did not reject her argument, the facts she relies upon in this argument are unsupported by the record.

Her claim that Shane did not acknowledge MJWS until she was two years old is contrary to the facts and evidence. MJWS was born in July of 2003. Shane filed a petition to establish paternity, joint legal custody and visitation in April of 2005 when she was only 22 months old. Before seeking the assistance of the law, both he and Amy testified they had discussed and attempted to reach agreement on a visitation schedule. They both testified they agreed Shane should have weekly visitation. Amy testified in 2004 before MJWS was a year old, Shane requested visitation on Father's day which she denied him. Shane testified that when he informed Amy Nicole he was reconciling with his wife, she then refused to allow him to see MJWS for several months. There was also evidence that in the first 22 months of MJWS's life, Shane wrote checks and gave cash to Amy Nicole for MJWS' support totaling between \$1300 and \$1600. Furthermore, there was evidence that Shane told his wife that MJWS was his child. (R. 7, 18-23, 29, 31-50; Exhibits 7, 9 & 10; T. 23-25, 40-42, 53-54, 69;; RE 4-9; AERE-16-19, 22-24, 40-41, 52-53, 69) Those are not the actions of a man who refuses to recognize his daughter or who intends to shirk or evade his duty and abandon or desert his daughter. Those are the actions

of a man who acknowledges paternity and wants a relationship with his daughter.

C. Amy Nicole's References to Facts and the Record in Her Brief Do Not Comply With the Law

Amy Nicole's Statement of Facts and references to the facts and evidence in her brief fail to present the evidence favorable to Shane and supportive of the Chancellor's decision as is required by the applicable standard of review. See *M.A.G.* and *Mabus*, *supra*. Her brief ignores all the evidence unfavorable to her position and the right of the Chancellor to make credibility judgments against the evidence she claims supports her positions. At times, her statements in regard to fact are outright wrong and totally unsupported by the evidence.

For example, contrary to statements on page 6, and at other places, in her brief, Shane did not wait two years before acknowledging MJWS and three years before seeking to assert his parental and custody rights. MJWS was born in July of 2003. In the first year and a half of her life, Shane saw and acknowledged his daughter and provided some support. Although there is variation in the specifics of their testimony, he and Amy Nicole both testified that initially they tried to work out these issues among themselves but were unable to do so, that Shane did have visitation with MJWS on a semi regular basis for part of the time prior to these proceedings, but that friction developed with Amy Nicole refusing Shane visitation on Father's Day and/or after Shane reconciled with his wife. He sought counseling and advice in this period on how best to mend the harm caused by his actions and to act responsibly and in the best interest of all his children. When he filed suit in April of 2005, MJWS was not yet two years old and he did seek joint legal custody. In early September of 2005 when MJWS was just barely two years old and after Amy Nicole was indicted on burglary and drug charges in June of 2005, he amended his

petition and sought primary physical custody. Shane was ready to go to trial at the first setting when MJWS was barely two years old. It was Amy Nicole's failure to cooperate and requests for extensions which delayed the trial until MJWS was three years old. (R. 7, 18-23, 29, 31-50; Exhibits 7, 9 & 10; T. 23-25, 40-42, 53-54, 69;; RE 4-9; AERE-16-19, 22-24, 40-41, 52-53, 69)

Furthermore, most of her references to facts in her brief are unsupported by any citation to the record. M.R.A.P. 28(a) requires reference to the parts of the record relied upon in both the Statement of Facts and Argument sections of the brief.⁷ In her statement of facts, there are only five references to the record in the first two paragraphs. There are no references to the record in the third paragraph. Even where there are some references to the record, the references often do not support her statement of fact or support only a small portion of a sentence or paragraph leaving the rest of the sentence and/or paragraph completely unsupported. At times, her brief completely misrepresents the testimony.

For example, in her second fact paragraph she states Shane paid only \$800 in support and only saw MJWS a few times during her first two years of life. She cites only page 52 of the transcript (AERE-40) which covers only support not visitation. Her \$800 figure does not include one of the two checks referred to on that page and established by other testimony to be for an additional \$500. Moreover, she ignores evidence from Shane, herself, and Tonya supporting the conclusion that he paid from \$1300 to \$1600 in support in the 22 months of MJWS's life prior to filing these proceedings. She also ignores her own testimony that during the first year of

⁷M.R.A.P. 28(a) also requires a Statement of the Issues which is also absent from her brief. She submitted a separate document entitled Appellant's Statement of Issues, but her brief does not really address her second issue alleging the Chancellor's decision was not in MJWS' best interest even under a full analysis of each of the *Albright* factors.

MJWS's life, Shane was "getting her every Tuesday and Wednesday or Wednesday and Thursday" which is clearly an admission he saw MJWS more than a few times, especially in view of other testimony concerning his visits with MJWS prior to instituting this action. (Appt Brief at 2, T. 12, 24-25, 40-42, 53-54, 69; AERE-30, 41-42, 52-53, 63-64, 69)

Her brief states the Chancellor took MJWS from the only home she had ever known since birth and sent her to live with a dad she hardly knew, citing no evidence for these statements.⁸ All the evidence is to the contrary establishing that MJWS was as comfortable with Shane and in Shane's home as in Amy's home and was an integral part of the family in Shane's home at the time the Chancellor gave Shane primary custody. Amy Nicole herself testified MJWS had a good relationship with Shane. (Exhibits 5, 7, 8, 9 & 10; T. 14, 19-20, 31-32, 44; AERE-2-24, 32, 36-37, 45-46, 55) Later on that same page, she states the "evidence was clear that Shane's wife, Tonya, was still uncomfortable with his illegitimate child ..." with no reference to the record. There was no evidence that Tonya was uncomfortable with MJWS at the time of trial or when the Chancellor gave Shane physical custody. To the contrary, the evidence was that they had formed a very strong bond – so strong that MJWS calls Tonya "mama" just as her twin half-siblings do. (Exhibits 5 & 7, T 19, 32, 44; AERE-2-6, 11-19, 36, 46, 55)

Amy Nicole also claims Shane testified that Tonya does not allow Shane or their twins to see Shane's family, citing p. 56 of the transcript. (Appt. Brief at p. 4) The question was not whether Tonya would allow Shane or the twins to see his family but whether Shane's parents would be allowed to keep the children if Shane and Tonya needed someone to keep them for

⁸Her citation on p. 4 of her brief to p. 21 of the transcript (AERE-38) refers only to animosity between Amy Nicole and Tonya who merely testified that they did not get along.

some reason. Shane's response was his wife would follow his decision, and that it was his decision, not Tonya's, that the children would not be left alone with his parents. He also testified he made this decision because his parents did not approve of his decision to reconcile with Tonya and the twins, that it would take time for the rift over that disagreement to heal, and that their disapproval of his reconciliation with this part of his family was the source of his decision that he would not leave the twins with them. He also testified that he does see his parents usually at his store. (T. 44-45, 56-57; AERE-55-56, 66-67)

In another misrepresentation of the testimony, she cites p. 20 of the transcript for her claim that Shane assisted with the daily care of his twins in the first years of their lives, but did not assist in MJWS's care in the first years of her life. Tonya was asked if Shane helped her care for the twins when they were babies. Her response was that she and Shane were separated for a year shortly after the twins birth, but that he now helps her care for them. This indicates he did not assist in the care of either the twins or MJWS when they were infants. (T. 20; AERE-37)

There is not room within the confines of this brief to continue with a page by page and sentence by sentence analysis of each place in Amy Nicole's brief where factual assertions are unsupported by appropriate citations to the record or to recount all the evidence contrary to each such assertion which was available to the Chancellor in rejecting her factual positions. The assertions are very similar to those made in her motion for reconsideration and/or new trial to the Chancellor. (R. 81-84) The Chancellor, in deciding that motion, carefully reviewed the entirety of the Court file, the pleadings and averments of the parties, and the entirety of the evidence before the court in light of Amy Nicole's statements, observations and arguments in her motion, and concluded yet again that the findings in his original opinion were fully supported by the

evidence and that her positions concerning the facts and evidence were not supported by the record. (R. 88-89) Appellee submits to the court that the statement of facts in this brief is a far more accurate representation of the evidence in this case, particularly in light of the standard of review and the Chancellor's role in judging the credibility of the evidence.

D. The Chancellor's Decision is Properly Supported by A Full Analysis of the Albright Factors

The Chancellor did not find that Amy Nicole will not and cannot provide proper parenting to MJWS as asserted by Amy Nicole on page 9 of her brief. Instead, a choice had to be made for primary physical custody that was in MJWS' best interest. She could not live with both her parents full time. Starting with both her parents on equal footing, and analyzing the *Albright* factors, he decided that it was in MJWS' best interest for her father to have primary physical custody and her mother to have liberal visitation. That is not an indictment of Amy Nicole as an unfit parent. It is an application of proper legal principles, putting the father on an equal footing with the mother, and weighing the factors by comparing each parent to the other. The point is to determine the best interest of the child at the time of the Chancellor's final decision, not at some prior point in the child's life or some prior point in the case. See *Law v. Page*.

Although Amy Nicole states in her separate statement of issues that the Chancellor's decision is manifestly wrong regardless of whether the full initial *Albright* factors are applicable or the modification of custody standard is applicable, she never really discusses the *Albright* factors in her brief. The Chancellor, however, fully discussed these factors and documented his reasoning, based on the evidence before him on each factor. Chancellor Dale's reasoning and weighing of the factors in awarding joint legal custody to both parents and primary physical

custody to the father is very similar to the reasoning upheld in *Romans* and other cases.

In regard to MJWS' age and health, Chancellor Dale found that she was normally healthy with some minor problems with asthma that both parents were capable of addressing, and that at age three and a half, she was undergoing tremendous acquisition of knowledge such that her parents needed to be aware of the impact of her environment on her physical, mental and spiritual development. But nothing about her age or health favored either parent. (R. 73; RE 13) There is no manifest error in this finding. In *Copeland v. Copeland*, 904 So. 2d 1066 (Miss. 2004), the court found that while an age of 18 months at the time of trial weighed slightly in favor of the mother, a Chancellor's finding that it favored neither parent was not manifest error. The court pointed out that once a child has reached the age where it can be cared for equally by persons other than the mother, the age factor equalizes. Given the evidence of all the people who have participated in MJWS' care, she has clearly reached that age. (R. 74; RE 14)

On comparative parenting skills and willingness and capacity to provide primary care, the court considered that both Shane and Amy Nicole were willing, that while Shane would rely on his wife to help provide care, Amy Nicole has had to rely on her mother, sister, and step-father to help provide care for MJWS. He noted Shane's willingness to encroach upon business time in order to have more time with Madison and his other children, his wife's availability to provide full time care for all his children. He did not make a specific finding that this particular factor favored either parent. He did find that there was no lack of quality of parenting skills or willingness or capacity to provide parenting by Shane. In other words, this factor did not weigh against Shane. (R. 73-74; RE 13-14)

On emotional ties, *Romans* found the Chancellor's finding that this factor favored the

father was supported by credible evidence when there was testimony that the child was “daddy’s girl,” and that her father engaged in many activities with her. There was considerably more evidence here supporting the very strong emotional bonds between MJWS and her father. All witnesses, including Amy Nicole, testified MJWS had a good relationship with her father despite Amy Nicole’s claims as to how little Shane had seen his daughter. The assistant principal of the local school who had known Shane and his wife and children as well as Amy Nicole and MJWS for years testified that when she was with MJWS at times when she was returned from Shane to Amy Nicole, MJWS would ask why she had to go back and would say that she wanted to stay with Shane. (T. 31; AERE-45) Dr. Tramontana reported that when her father entered the room, MJWS ran to him and jumped into his arms. (Exhibit 5; AERE-11) Dr. Galloway, who observed Madison both in Amy Nicole’s home and in the Stockstill’s home, found that despite the much limited time that MJWS had in the Stockstill home through the court imposed visitation schedule pending a full trial on this matter, MJWS had established such strong bonds to Shane, her Stockstill half-siblings, and their family home life that she was as much at home in Stockstill home as in Amy Nicole’s home with Amy Nicole’s family. (Exhibit 7; AERE-16-19) Thus, there was certainly credible evidence to support the Chancellor’s finding that this factor favored Shane because the strength of the emotion bond between him and MJWS was remarkable in light of the limited time available within which to develop that bond.

The Chancellor found that the employment and employment responsibilities of the parents favored Shane. He based this finding on the fact that Shane was not only in a better position to make work accommodations to spend time with his children, but that he had done so and could do so without sacrificing financially while Amy Nicole would suffer financial

consequences with repercussions on her ability to support her children if she altered her work to spend more time with MJWS. (R. 74; RE 14) A parent's flexibility in working schedule as a result of being the owner of his own business is a factor which may properly be considered as favoring the parent for physical custody. *Copeland* at ¶ 42.

The Chancellor credited Shane with his willingness to seek counseling, the progress he has made in counseling, his commitment to repair and strengthen his marriage, and the progress he has made in turning his life around after making mistakes under the factor of mental health. His findings that Shane's mental health is more favorable than Amy Nicole's, particularly taking into account her lack of maturity, her participation in criminal activity, and the effect it has had on her life and her ability to provide stable support for her children is supported by substantial credible evidence in the reports of Drs. Tramontana and Galloway as noted in the Chancellor's findings. (R. 74-75; RE 14-15) Although it was addressed under the factor of moral fitness, *Romans* found a Chancellor was justified in favoring one parent over another on a factor because one parent had done a better job than the other at learning from mistakes and turning his life around. 939 So. 2d 849 at ¶ 15.

On moral fitness, Chancellor Dale found both parents had made mistakes in the past, but that Amy's mistakes involving criminal behavior and drugs were much more pronounced. He found this factor favored Shane because Shane had clearly made positive progress in turning his life around but he did not find that the evidence supported such improvement by Amy Nicole. Elsewhere in his opinion, when comparing stability of Shane and Amy-Nicole, he pointed out the stability of Shane's marriage and family life and his commitment to strengthening his marriage and family bonds compared to Amy-Nicole's lifestyle of children without marriage, lack of

commitment, poor choices, and involvement in criminal activities and sentenced to home arrest casting a cloud on her future ability to provide a stable home, her ability to make sound decision, and her ability to turn her life around and keep it going in the right direction. (R. 74-75; RE 14-15) In *Romans*, the Chancellor was found to be justified in finding this factor favored the father solely because the mother had three children by different fathers without marriage to any of them and the father appeared to have learned from his past mistakes and had turned his life around significantly. 939 So. 2d 849 at ¶ 15.

The Chancellor found that the factor of stability of home environment and employment weighed heavily in Shane's favor. As he pointed out, he did not find that Amy Nicole would be an unfit parent or that she could not provide a proper home environment or financial support for MJWS. But in comparing the probable future *stability* of the home environment and employment, Shane clearly has a much more stable situation than Amy Nicole. (R. 75; RE 15) It was not error on this factor for the Chancellor to consider Shane's married status and the availability of his wife as a stay at home mother to provide care for all his children in comparison to Amy Nicole's unmarried status, Shane's steady and reliable progressive employment history in comparison to Amy Nicole's erratic employment history involving charges of burglary by one of her recent employers to whom she is paying restitution, her plea of guilty to narcotics charges, her ten year sentence (currently conditionally reduced to three years of house arrest and 7 years probation) and the effect it has on her employment situation, and her erratic behavior which would include her failure to keep court ordered appointments with Dr. Galloway and some of her choices in living arrangements and companions which resulted in her pleading guilty to drug possession charges in connection with a search of the place where she was residing with MJWS.

Romans at ¶ 18 found it appropriate for the Court to consider the father's marriage and the availability of his stay-at-home wife to provide care for the child to favor the father on this factor.

The Chancellor did put more emphasis on the factor of stability of the home environment and employment of the parents, but his discussion of what he considered under this factor ties it into other factors such as moral fitness, the employment situations of the parents, and mental health of the parents as well as factors such as maturity and decision making which affects such things as comparative parenting skills as well. (R. 74-75; RE 14-15) Moreover, the case law holds that a Chancellor may put more weight on some factors than others. Applying the *Albright* factors is not a mechanical matter like applying a mathematical formula. *Buchanan v. Buchanan*, 587 So. 2d 892, 898 (Miss. 1991). As long as the Chancellor properly recognized the *Albright* standard, went through an analysis of the *Albright* factors recording his findings on the factors as a whole in regards to which parent the factors favor, and reached findings for which there is credible evidence in the record, an appellate court will not re-examine all of the evidence to see if it agrees with the chancellor's ruling. Our courts have repeatedly found that a Chancellor's reliance on the evaluations of court appointed specialists like Dr. Galloway and Dr. Tramontana, as well as testimony similar to that in the present case, provide a substantial credible basis for the Chancellor's findings on the *Albright* factors. See e.g. *Norman v. Norman*, No. 2005-CA-00882 -COA, 2007 Miss. App. LEXIS 505 (Miss. Ct. App. Aug. 7, 2007); *Brewer v. Brewer*, 919 So. 2d 135 (Miss. App. 2005). Although Amy Nicole stipulated to the admission of their reports into evidence without the need for their testimony in the pre-trial order (R. 59-62), she fails to mention any of the support provided in those reports for Chancellor Dale's finding that the *Albright* factors favor Shane and support the Chancellor's conclusion that it is in MJWS' best

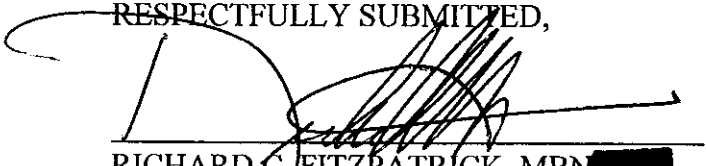
interests for her father to have primary physical custody.

CONCLUSION

The Chancellor clearly stated the Albright standard correctly in his memorandum opinion and then properly applied it recording his consideration and the weight he assigned to each factor. There was substantial credible evidence in the record to support both each finding and his overall finding that it was in MJWS's best interest for her father to have primary physical custody. This court is not at liberty to reconsider all the evidence, to reweigh the evidence or to make different credibility judgments than those made by the Chancellor. The record in this case does not support a conclusion that the Chancellor's ruling was clearly erroneous. Thus, this court is bound to uphold the judgment. *In re Custody of M.A.G.*, 859 So.2d at 1004 (P8). Amy Nicole has not even addressed the applicable controlling case law in her brief, much less provided sufficient authority and reasons for changing or overruling the current law. Moreover, there is no indication in the pleadings, the pretrial order, or the trial transcript that she or her counsel suggested at any time prior to the Chancellor's ruling four and a half months after trial that the *Albright* analysis was inapplicable, that the existence of a material change in circumstances standard was an issue to be tried, or that the Chancellor's decision should be based upon a modification of custody standard because Shane had delayed too long in seeking primary physical custody. If she wished to make an argument that Shane was entitled to physical custody only upon demonstrating a material change in circumstances since some unspecified date based on his alleged delay in not seeking paramount physical earlier, then it was incumbent upon her to raise that point in setting out her positions in the pre-trial order. We have eliminated the practice of trial by ambush. Yet that is precisely what Amy Nicole seeks with her position in her

post trial motion for reconsideration and the arguments she raises on appeal. To reverse the Chancellor's decision based on her arguments would subject Shane to the loss of his parental custody rights under a standard of proof which neither he nor the court was aware was at issue or that he would be required to meet when this case was tried, which truly would be trial by ambush. Accordingly, the judgment of the Chancery Court should be affirmed.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have mailed the original and three (3) true and correct copies of the above and foregoing Brief of Appellee, Marcus Shane Stockstill, and Record Excerpts, via First Class U.S. Mail to:

Hon. Betty W. Sephton
Clerk, Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellee, Marcus Shane Stockstill, and Record Excerpts, via First Class U.S. Mail to:

Hon. William E. Andrews, III
Hon. Candace L. Rickman
WILLIAM E. ANDREWS, III LAW OFFICE, PLLC
99 Main Street
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Purvis, MS 39475

Chancellor Sebe Dale, Jr.
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Columbia, MS 39429

I further certify that pursuant to M.R.A.P. 28(m), that I have also mailed an electronic copy of the above and foregoing Brief of Appellee, Marcus Shane Stockstill, on an electronic disk and state that this brief was written in Wordperfect format.

This the 27th day of September, 2007


RICHARD C. FITZPATRICK, MBN 