IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHANCERY COURT NO. 05-03-0436-ML

STEVEN W. COLLINS	APPELLANT
VS.	NO. 2007-CA-00717
MELANNIE (BLAYLOCK) COLLINS	APPELLEE

APPEAL FROM THE CHANCERY COURT OF

DESOTO COUNTY , MISSISSIPPI

CAUSE NO. 05-03-0436-ML

BRIEF FOR APPELEE

(ORAL ARGUMENT NOT REQUESTED)

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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 Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Melannie Blaylock Collins, Appellee
2. Steven W. Collins, Appellant
3. Steven Wayne Collins, Jr., minor child of the parties
4. James P. Vance, Attorney for Appellee
5. Malenda H. Meacham, Attorney for Appellant
6. L. Anne Jackson, Attorney for Appellant
7. Honorable Mitchell M. Lundy, Jr., Chancellor of DeSoto County Chancery Court

This the 14th day of February, 2008.

JAMES P. VANCE

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STATEMENT OF THE ISSUES

Appellee will respond to issues set forth by Appellant.

STATEMENT OF THE CASE

Steve Collins filed a complaint for divorce on March 14, 2005, on fault grounds, (R. 7-14)[1]. Melannie Collins filed her answer and cross-complaint for divorce on June 7, 2005, on fault grounds, (R. 17-26). Both parties requested custody of their minor son, **S. C.**, whose date of birth is **September 19, 1997**, who was seven (7) years of age at the time of the parties' separation. On August 17, 2006, an agreed temporary order was entered wherein the parties shared joint legal and physical custody, (R. 36-37).

Also on August 17, 2006, an order of continuance was granted on the motion by **Steve**, for a *Guardian ad litem* to be appointed, (R. 36-37).

On December 30, 2007, a new *Guardian ad litem* was appointed because of a conflict, (R. 53-54).

On January 11, 2007, the parties entered a stipulation of consent to divorce pursuant to Miss. Code Ann. 93-5-2, wherein the parties agreed to a divorce on the grounds of irreconcilable differences and set forth the following issues for determination:

(1) Issue of custody of their minor child, S. C.;

(2) Issue of visitation of their minor child, S. C.;

(3) Issue of child support including health insurance and life insurance;

(4) Issue of college expenses, (R. 60-61).

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1 R. refers to the record of Clerk's papers. T. refers to the main transcript of the hearing. Supp. T. refers to the Chancellors oral opinion from the bench on March 1, 2007. The transcript of the August 17, 2006, temporary hearing will be referred to in the record excerpts of Appellee asT.H. R.E. will represent Appellee's record excerpts.

In order to make the record complete, a joint motion to withdraw answer, denial and contest by both parties was filed in this matter and an order was entered on February 5, 2007, (R. 71; R.E. 30). An order allowing the withdrawal of answer, denial and contest was filed on February 6, 2007, (R. 72; R.E. 31). An amended stipulation was filed on February 9, 2007, wherein the parties agreed to a divorce on the grounds of irreconcilable differences and agreed that all testimony adduced at the hearing could be considered by the Court in determining the issues set out by the parties on which they could not agree, to-wit:

(1) Custody;

(2) Visitation;

(3) Child support, health insurance and life insurance;

(4) College expenses, (R. 73-76; R.E. 32-35).

On March 1, 2007, the Chancellor issued his opinion applying the Albright Factors and set forth his decision on custody, (Supp. T.; R.E. 1-15). On April 12, 2007, the divorce decree incorporating the Court's opinion was entered, (R. 77-84; R.E. 16-23). Steve has appealed the Court's decision.

STATEMENT OF THE FACTS

Steve Collins and Melannie Collins were married on August 21, 1998. S. C. was born to them on September 19, 1997, almost a year prior to their marriage, however, Steve acknowledges that S. C. is his child.

Melannie has Amy, a thirteen (13) year old special needs child, from a prior marriage. After S. C.'s birth, the parties moved to Grenada, Mississippi. Both parties worked shift work and would alternate the care of S. C. while the other was at work. Both parties worked multiple jobs to make ends meet. Steve was a fireman, ambulance driver and paramedic. Melannie is a registered nurse and worked part time for an ambulance service. Melannie worked three (3) weekends a month, Friday, Saturday and Sunday from 7 p.m. to 7 a.m., (T. 231-232; R.E. 38-39). She cared for the children the rest of the week. Occasionally, she would work part time for an ambulance service in Greenwood, Mississippi, (T. 232; R.E. 39).

While in Grenada, Melannie and the children attended Sunday school and church at Friendship Baptist Church. Steve would occasionally meet them in the sanctuary for church, (T. 232; R.E. 39). Although Steve acknowledged when placing an ad on a Yahoo personal ad that he "rarely" attended church, he now professes that he started going a few months prior to trial, (T. 141; R.E. 40).

The parties moved to Hernando, Mississippi in July, 2003 to be closer to Steve's job in Southaven, Mississippi and Melannie's job in Memphis, Tennessee. Melannie is a registered nurse and paramedic, (T. 231; R.E. 38), who flies on a helicopter to care for severe trauma cases. Steve is a fireman and EMT.

Both parties worked a twenty-four (24) hour shift and alternated caring for the children while the other was at work, however, Melannie testified that she was the one who did the scheduling of the families work and school activities, (T. 244; R.E. 41).

Melannie had a brief, two (2) month affair beginning in December, 2003. Steve discovered the affair, and the parties attempted to reconcile, (T. 115; R.E. 42). Melannie continued to live with Steve and tried to make their marriage work. After a month, Melannie left because of Steve's conduct towards her, (T. 40-41, 280; R.E. 43-44, 45).

Melannie moved to Pope, Mississippi and left the children in Hernando with Steve for two (2) weeks with the idea that they would continue alternating care from two (2) different households, (T. 41; R.E. 44). Once Steve filed for divorce, Melannie brought her daughter, Amy, to Pope where her mother worked and extended family lived. Melannie's home is on the Pope School grounds next door to the school.

During the separation, Melannie cared for Amy, her special needs child, and worked. Although there was a conflict in testimony about the amount of time Melannie spent with S. C., Melannie agreed that the child stayed over night with his dad in Hernando most of the time because he was in the Hernando school system.

Steve would attempt to interfere with Melannie spending time with the child by promising to do things with him even though S.C. was supposed to be with her, (T. 55-56, 63-64; R.E. 47-48, 49-50). Melannie testified that she called her attorney at least once a week for eighteen (18) months, trying to get him to "do something, do something, do something" before finally getting a temporary hearing which was held on

August 17, 2006, (T. 65; R.E. 51). The parties shared joint physical custody after the temporary hearing until the Chancellor rendered his opinion on March 1, 2007, whereby each party had the child three (3) to four (4) days a week, (R. 34-35; R.E. 36-37).

Melannie is able to be with the children twenty-four (24) hours a day, five (5) days a week. On the days that Melannie has to work, she has a friend assist in care for her daughter, Amy, and S. C. The children remain in their own home except for the time that S. C. goes to his Father.

Pope is recognized as an excellent school, (T. 186; R.E. 52). S. C. and his sister, Amy, are very close. Amy is very attached to her brother, (T.60, 216; R.E. 53, 54). Melannie has family and extended family in Pope to assist in the care of S. C. and her daughter, Amy.

Steve works in Southaven for ten (10) twenty-four (24) hour shifts per month, (T. 77; R.E. 55). Steve relies on his eighty-one (81) year old mother to drive to Hernando once a week for two (2) to three (3) days to care for S. C., (T. 155, 158; R.E. 56, 57). He also would leave the child with a friend in Hernando, who has five (5) other children, ten (10) days a month, (T. 12; R.E. 58). Although Steve made much ado about Melannie not attending some of S. C.'s ball games, Steve's mother testified that Steve would not go many times either because of the demands of his work, (T. 156, 162; R.E. 59, 60). She testified that "most of the time" she had to take S. C. to ball games, (T. 163; R.E. 61). Although Steve claims to have had the child over night eighty percent (80%) of the time prior to the temporary order, he admitted that seventy percent (70%)

of that eighty percent (80%) a baby sitter had S.C., (T.H. 19; R.E. 62).

Steve further admits that it would be better for S.C. to stay in his own home rather than uprooting him every other day to have a baby sitter care for him, (T.H. 23; R.E. 63).

Melannie testified that Steve had a problem with anger, (T. 73-74; R.E. 64-65). On one occasion, Melannie locked herself in a bathroom to get away from him, (T. 211; R.E. 66). She expressed concerns over Steve's inconsistent parenting. On one occasion, Steve spanked the child leaving marks, (T. 258-261; R.E. 67-70). Although Steve denies that he put the bruises on the child, he insists that S.C. bruises easily, (T.H. 24; R.E. 71). Even Steve's own witness, Wilton Davis, II, who had known Steve since second grade, testified that Steve was "high strung, he winds up sometimes, sometimes he's all right", (T. 183; R.E. 72).

Subsequent to the separation, Steve also worked a part time job in addition to his regular job. Steve was working eight (8) hours a day from 8:00 a.m. until 4:30 p.m., in addition to his twenty-four (24) hour shift job, (T. 87; R.E. 73).

Steve lives in an apartment complex in Hernando. Melannie expressed concern about Steve allowing S.C. to run the complex. Steve acknowledged that there were a couple of little boys in the complex that could be "unruly", (T. 98; R.E. 74). He is forty-four (44) years of age and went to school through the eleventh (11^{th}) grade, (T. 101; R.E. 75). After the separation, Steve filed bankruptcy and left Melannie with all of the marital bills for which she had to pay, (T. 118; R.E. 76).

Steve denied having a romantic involvement under oath, however he was seen

holding hands with a woman at a rodeo, (T. 49, 218; R.E. 77, 78). Although Steve tried to portray Melannie as an absent mother, Melannie talked to S. C. every day and was involved in his life, (T. 255; R.E. 79). Steve acknowledges that Melannie is a good mother, (T. 119; R.E. 80).

The Court, after hearing all testimony, awarded the parties joint legal and physical custody with Melannie having S.C. during the school year and one (1) week after school gets out and one (1) week prior to school beginning, and Steve having physical custody the entire summer months. Steve was awarded custody **every** spring break. The Court split up the holidays. Each party was ordered to pay child support to the other when that party did not have physical custody, (R. 77-84; R.E. 16-23).

SUMMARY OF THE ARGUMENT

The Court correctly considered and applied the Albright Factors. The decision of the Chancellor should not be disturbed unless the factual findings are manifestly wrong or clearly erroneous. This Court does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder. If there is substantial evidence in the record to support the Chancellor's findings of fact, no matter what contrary evidence there may also be, this Court has upheld the Chancellor, *Wright v. Stanley, 700 So. 2d 274, 280 (Miss. 1997).*

Appellate Court needs only to determine if the Chancellor's decision was supported by credible evidence, *Lee v. Lee, 798 So. 2d 1284(Miss. 2001).* The Chancellor is in a better position to ascertain the truth and veracity of the witnesses.

The paramount consideration in any child custody case is the best interest of the child, *Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983).* After applying the Albright Factors to the facts of this case, the Court concluded that the best interest of S.C. would be served by awarding joint physical and legal custody to both parents with S. C. residing with Melannie during the school year and the child residing with Steve the entire summer, with each party having visitation every other weekend when the other parent has physical custody. The Chancellor gave Steve most of the holidays such as Spring Break. Each was ordered to pay child support to the other, (R. 77-84; R.E. 16-23). The Court's decision should not be disturbed. The Court's award of joint custody was appropriate.

A *Guardian ad litem* was appointed **at the request of Steve** because Melannie

had expressed concern over the severity of Steve's spanking of S.C., (R. 36-37; R.E. 24-25). The *Guardian ad litem* was to investigate abuse, not take over the function of the Chancellor. The *Guardian ad litem* found no abuse, (T. 281; R.E. 46). Melannie testified that she did not think that S.C. was abused by Steve, (T. 261; R.E. 70). The Chancellor took offense at the suggestion by the *Guardian ad litem* that a burden would be put on S.C. if the children were kept together, (Supp. T. 9; R.E. 9).

The Chancellor appropriately took into account the *Guardian ad litem's* testimony and found that joint custody was appropriate.

ARGUMENT

I.

Standard of Review

An Appellate Court will not disturb the factual finding of the Chancellor unless these factual findings are manifestly wrong or clearly erroneous.

The standard of review applied by this Court is well settled. Chancellor's are vested with broad discretion, and this Court will not disturb the Chancellor's findings unless the Court was manifestly wrong, the Court abused its discretion, or the Court applied an erroneous legal standard, *Sandlin v. Sandlin, 699 So, 2d 1198, 1204 (Miss. 1997).* This Court correctly considered and applied the Albright Factors. The decision of the Chancellor should not be disturbed unless the factual findings are manifestly wrong or clearly erroneous. This Court does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder. If there is substantial evidence in the record to support the Chancellor's findings of fact, no matter what contrary evidence there may also be, this Court has upheld the Chancellor, *Wright v. Stanley, 700 So. 2d 274, 280 (Miss. 1997).*

Appellate Court needs only to determine if the Chancellor's decision was supported by credible evidence, *Lee v. Lee, 798 So. 2d 1284 (Miss. 2001).* The Chancellor is in a better position to ascertain the truth and veracity of the witnesses.

The Chancellor considered and applied the Albright Factors to this case. His decision should not be disturbed.

II.

The Chancellor was correct in his application of the Albright Factors in placing physical custody with Melannie during the school year.

Steve cites *Hollon v. Hollon, 784 So. 2d 943 (Miss. 2001)* and *Brekeen v. Brekeen, 880 So. 2d 280 (Miss. 2004)* as an example, where the Chancellor was reversed. These cases have no application to the facts of this case. *Divers v. Divers, 856 So. 2d 370 (Miss. 2003),* again, only stands for the proposition that the Chancellor **can** be reversed if the finding of the Chancellor is contrary to the evidence. Again, that case has no application here. The *Watts v. Watts, 854 So. 2d 11 (Miss. App. 2002)* case asserted by Steve is not on point with the facts in this case.

The record here reflects that both parties have similar work schedules. Steve puts much emphasis on the fact that he attended more baseball and soccer games than Melannie, although his own mother's testimony tended to show that he exaggerated his attendance. The fact that Steve thought it was so important may be why the Chancellor allowed him to have custody during baseball season.

Further, there is no evidence that Steve was "penalized" for not having a large extended family in the area to draw upon for assistance. It is, however, **one** of the factors the Chancellor can appropriately consider, *Mixon V. Sharpe, 853 So. 2d 834 (Miss. Ct. App. 2003).*

The following is an analysis and argument of the Albright Factors as set forth by the Court and analyzed by Melannie.

A. Health and Sex of the Child:

Melannie would assert that this factor favors neither party, although Melannie agrees that S.C. needs a strong Father figure and male role model in his life. The extended amount of custody awarded to the Father in the summer when the child is out of school, allows Steve to fulfill that role. In fact, S.C. would probably be able to spend more time with his Father in the summer than if the Father had his custody during the school year. The Court found that this factor favors the Father and Melannie concedes that the Chancellor's finding should not be disturbed.

B. Continuity of Care:

Prior to the separation, both parties shared in the care of S.C. After separation, up until the temporary hearing, Steve spent more time with the child. After the temporary hearing, until trial, the parties shared joint custody.

Steve attempts to confuse Melannie's inability to live with him and her continuity of care.

Melannie could not stay in the home with Steve and continue to work. Steve would keep her up all night fighting. Melannie had to get out, (T. 40, 280-281; R.E. 43, 45-46).

Melannie explained why she left the children with Steve for approximately two (2) weeks until she got Amy and enrolled her in Pope School. She did not think she could take S.C. out in the middle of the school year. She enrolled the child in Pope Schools at the beginning of August until the temporary hearing when S.C. was allowed to go back to Hernando.

Since the temporary order, the parties have shared joint custody. Steve complains that Melannie did not give him any money, however Melannie was paying off marital debts incurred by Steve and Melannie. Steve did not give Melannie any money for expenses while S.C. was at her house. Melannie bought clothes and had day care expenses for S.C. Steve filed bankruptcy and did not have any marital debt, (T. 118; R.E. 76).

While Steve chose to file bankruptcy to get rid of his obligations, Melannie attempted to work to pay off the marital debts. Melannie disputes that S.C. rarely visited her, although she admits that he stayed over night more with his Father and/or the babysitters than with her until she got a temporary order. She also explained how Steve would manipulate the child to get him to come back to Hernando when S.C. was with her. Steve admitted that Melannie wanted to bring S.C. to Pope with her and his sister, Amy, from the start but did not want to disrupt his school year, (T. 281; R.E. 46).

Melannie did not want to put the child in the middle of a fight with Steve over time with the child. After considering the evidence, the Court found that this factor favored the Father. The Chancellor's decision should not be disturbed.

C. **Best Parenting Skills:**

The Chancellor correctly concluded that Melannie had the better parenting skills. Melannie described to the Court how inconsistent Steve was with his discipline. Steve would let things go until he would blow up. The Chancellor heard about Steve spanking S.C. Steve admitted to spanking the child, although denying that he put the

bruises on him. Steve argues that S.C. bruises easily, (T.H. 24; R.E. 71). The Court also heard testimony concerning Steve's anger. Stephanie Thompson heard Steve screaming and banging on the bathroom door while Melannie was locked inside, (T. 211; R.E. 66). Steve's own witness, who had known him since the second (2nd) grade, admitted that Steve has a temper when he gets wound up. Steve acknowledged that Melannie was a good mother, (T. 119; R.E. 80).

The Court, after hearing all of the witnesses and observing their demeanor, found that this factor favors the Mother, Melannie, especially with relationship, instruction, education and discipline, (Supp. T. 9; R.E. 9).

The Chancellor heard all of the witnesses and determined that the Mother had better parenting skills. The Court's decision should not be disturbed.

D. <u>Willingness and Capacity to Provide Primary Child Care:</u>

The Court was correct in finding this factor favored the Mother. The testimony revealed that Melannie worked eight (8) twenty-four (24) hour shifts a month. Steve worked ten (10) twenty-four (24) hour shifts a month, (T. 249-250; R.E. 81-82).

Melannie's schedule was more flexible than Steve's schedule, however both parties have flexibility to spend time with the child because of their shift work.

Steve had to rely on his eighty-one (81) year old mother to drive from Grenada to Hernando three (3) or four (4) times a month to care for S.C., or he had to take the child to a friend's house to stay.

When S.C. was at his Mother's home, he stayed in his house on the school campus with his sister. Further, that the Mother has extended family in Pope, a

brother and sister-in-law, to assist her in providing child care.

The Chancellor did not penalize Steve because he had no extended family support in Hernando as asserted by Steve. In *Neville v. Neville, 752 So, 2d 352 355 (Miss. App. 1999)*, the Court held that extended family structure contributes to the child's stability and is a legitimate factor to be considered in custody decisions. This was affirmed in *Messer v. Messer, 850 So. 2d 161.*

The Chancellor was correct in finding this factor favored the Mother.

E. Employment of the Parents and Responsibilities of that Employment:

The Court found that the employment and employment responsibilities of Steve and Melannie were equal.

Melannie would assert that this factor should favor the Mother. While both parties work shift work, the Court found that Steve worked more days than Melannie. In addition to his regular job, Steve was working part time as an ambulance EMT. Melannie asserts if any error was made, this factor should have favored the Mother, however this Court should not substitute its judgment for the Chancellor, *Wright v. Stanley, 700 So, 2d 274 (280) (Miss. 1997).*

F. Physical and Mental Health and Age of the Parties:

Melannie concedes that this factor favors neither party.

G. Emotional Ties of the Parent and the Child:

The Court correctly found that the emotional ties of the parent and the child were equal. Steve argues that the he spent more time with the child after separation.

This was true until the temporary order was entered. The child was in school in Hernando.

Melannie spent time with the child on a daily basis by phone or in person. After the temporary order was entered, both parents spent equal amounts of time with S.C.

Steve tried to make an issue of how many nights S.C. stayed in Hernando a month versus the nights the child stayed in Pope, however, prior to the temporary hearing, approximately seventy percent (70%) of the nights the child was in Hernando, he was not with the Father, but with the elderly grandmother or a neighbor, (T.H. 19; R.E. 62).

Steve argues that the child wanted to spend time with him when Melannie had him, and Melannie would allow the S.C. to go back to see Steve. Steve asserts that this is evidence of a stronger emotional attachment. I would submit that this is strong evidence of manipulation and emotional abuse by the Father. It reminds me of the Old Testament story about wise King Solomon who acted as if he were going to cut a child in half and give one half each to two (2) women that were fighting over the child. The mother, who would rather give the child up than see the child harmed, received custody.

Melannie would sacrifice her own desire to be with S.C. and allow the child to see Steve instead of upsetting the child after his Father's emotional manipulation.

There is no question that **both** parents have strong emotional ties to the child and the child to the parents.

H. **Moral Fitness of the Parents:**

The Chancellor found that this factor favored Steve because of two (2) affairs that Melannie admitted during the marriage. One (1) was a brief, two (2) month affair prior to the separation, and one (1) was during the year and a half the parties were separated. Melannie acknowledged her conduct.

To the contrary, Steve asserted, under oath, that he had not engaged in an illicit relationship. The evidence adduced proved that he had dated a woman and was seen at a rodeo, holding hands with another woman. Melannie does not really make an issue of this factor other than to point out that she acknowledged her failings, while Steve was not candid with the Court about his moral failings. He was forced to admit that he had put a personal ad on Yahoo personals looking for a woman, but again tried to make it someone else's fault, (T. 95; R.E. 83). He also acknowledged that he had gone with Roberta, a woman who lived in his complex, to the Mid-South Fair, (T. 127; R.E. 84).

Melannie and the children regularly attend church. Steve does not, or has only recently started going to church. Steve put that he rarely attended church on his Yahoo ad, (T. 141; R.E. 40). In spite of both parties' failings, the Court found that this factor favored Steve. The Chancellor's findings should not be disturbed.

I. **Home, School, and Community Record of the Child:**

At separation, Melannie moved to the small community of Pope, Mississippi some thirty (30) miles from Hernando. Melannie's home is on the Pope school grounds. Her mother is the principal of the Pope School. Melannie allowed the child to finish

the school year in Hernando with the belief that Court would resolve the custody issue.

The Court found that this factor favored Steve because the child had attended Hernando Schools and participated in baseball and soccer. The Chancellor's findings should not be disturbed.

J. The Preference of the Child at an Age Sufficient to Express a Preference by Law:

The Chancellor correctly determined that this factor was not applicable.

K. Stability of Home Environment and Employment of Each Parent:

The Chancellor correctly determined that this factor favored Melannie.

Steve argues that he was penalized for not having more family in Hernando, contrary to *Watts v. Watts, 854 So. 2d 11 (Miss. App. 2002).*

There were certainly other factors that played a large part in the reversal of the Special Judge in *Watts v. Watts, 854 So. 2d 11 (Miss. App. 2002).* These facts are not applicable here. This Court has recognized that the fact that one parent's home is near friends and extended family may be considered under this factor, as well as, under the "home, school, and community record of the child" factor. *Bell on Mississippi Family Law, page 110; Mixon v. Sharp, 853 So. 2d 834 (Miss. App. 2003).*

Melannie's home was a single family home located on Pope School grounds, whereas Steve lived in an apartment complex in Hernando. S.C. was residing in the home in Pope when Melannie had custody, whereas S.C. stayed with a family friend at his home in Hernando on the ten (10) to twelve (12) days a month while Steve worked. In addition, Steve's eighty-one (81) year old mother dept S.C. two (2) to three (3) days a

week.

The evidence was undisputed that Pope School system is excellent, and S.C.'s grandmother, the school principal, and aunt and uncle were available during the week to assist Melannie with her son.

Melannie and the children regularly attended church. Steve did not according to the information submitted to the Yahoo personal ad, (T. 141; R.E. 40).

The Chancellor correctly determined that the stability of the home environment favored the Mother. This finding should not be disturbed.

L. Other Factors:

The Court found that the separation of S.C. from his sister would not be in the best interest of either child. Granted, Amy is his half-sister, however the evidence showed, and the Court so found, that a close relationship existed between S.C. and his sister, (T. 216, 248; R.E. 54, 85).

There is a strong preference in Mississippi Law for keeping siblings together unless unusual circumstances justify their separation, *Sellers v. Sellers, 638 So. 2d 481, 484 (Miss. 1994).*

This Court has approved of the award of custody to allow a child to remain with his half brothers and sisters, most other factors being equal, *McWhirter v. McWhirter, 811 So. 2d 397 (Miss. App. 2001).*

There are no unusual or compelling facts in this case justifying the separation, and the Chancellor was correct in considering this factor favoring the Mother.

M. Stated Basis for the Chancellor's Custody Decision:

After hearing much testimony and applying the *Albright Factors* to this particular case, the Court awarded joint legal and physical custody to the parties. The Mother had physical custody during the school year, and the Father had physical custody during the summer.

Melannie had already enrolled the child in Pope Schools at the beginning of the school year and was glad to finally be able to bring him back even though it was March contrary to the assertion by Steve that she objected to it.

The Chancellor thoughtfully weighed all of the evidence, applied the facts to the Albright Factors, and rendered his opinion. The findings are amply supported by the evidence. The Appellate Court should give great deference to the Chancellor's decision and may reverse only for errors in application of the law, or if this Court is convinced that the Chancellor abused his discretion, *McWhirter v. McWhirter, 811 So. 2d 397(Miss. Ct. App. 2001).*

III.

The Chancellor's award satisfied the requirements of joint physical custody.

Steve cites *Rush v. Rush, 932 So. 2d 794 (Miss. 2006)* for the proposition that this case should be reversed because the time awarded Steve was insufficient to constitute joint physical custody. *Rush v. Rush, 932 So. 2d 794 (Miss. 2006)* involves child support awarded to Mrs. Rush, when Mr. Rush had physical custody a majority of the time.

The Court determined that although Mrs. Rush was awarded joint physical custody, she really only had visitation and should not receive child support.

In the present case, Steve has custody **all** of the summer months in which the child is out of school, except for two (2) weeks to allow Melannie to take the child on vacation.

Steve has every spring break. Considering the fact that S.C. is in school during Melannie's period of custody, Steve probably has more actual time with the child.

The Court, in trying to fashion custody for the best interest of the child, is now criticized by Steve for awarding him joint physical custody instead of visitation only.

In addition, Melannie pays child support to Steve during his periods of custody and has visitation on every other weekend while he has custody. Steve pays Melannie child support and has visitation every other weekend while Melannie has custody.

The award of joint custody as set forth by the Chancellor should be sustained.

IV.

The Chancellor did not commit reversible error in his opinion and properly addressed the *Guardian ad litem's* concerns.

The Chancellor considered the *Guardian ad litem's* concerns in his opinion.

Steve represents that a *Guardian ad litem* was required by law. Melannie disputes that a *Guardian ad litem* was required. Melannie never accused Steve of abusing S.C. and did not believe that he had. Melannie expressed concern over a spanking that Steve had given S.C. on one occasion. In discovery, Steve's attorney was provided with some information pertaining to Melannie's concern and pictures of S.C.,

(R. 36-37; R.E. 24-25).

In this case, **Steve** requested the *Guardian ad litem* and was required to post $1,500.00 for the payment of her services, (R. 36-37; R.E. 24-25). The purpose was to investigate whether or not Steve had abused S.C. Melannie argues the real reason for the motion for continuance by Steve was to delay the proceedings.

There is no record of the Department of Human Services opening a case. Although they were called by the school, there is no evidence that they opened up a case. The *Guardian ad litem* was not mandatory, therefore the Court is not required to put on the record the reason for rejecting the *Guardian ad litem's* recommendations, *Tanner v. Tanner, 956 So. 2d 1106(Miss. 2007).*

Even if the *Guardian ad litem* was required, she found no abuse and made no recommendations that the Chancellor rejected which required him to articulate on the record, (T. 281; R.E. 46).

Steve's attorney continued to question the *Guardian ad litem*, who expressed two (2) concerns. One (1) was the events surrounding the separation. The Chancellor addressed this concern when he found that the continuity of care Albright Factor favored the Father.

The second (2nd) concern of the *Guardian ad litem* was "S.C.'s responsibility to Amy", (T. 284; R.E. 86). There were **no recommendations** of the *Guardian ad litem* to address in the Court's opinion.

The Court did, however, address the *Guardian ad litem's* concern and took offense to the suggestion by the *Guardian ad litem* that a burden would be put on S.C.

by keeping the children together, (Supp. T. 9; R.E. 9).

The *Floyd v. Floyd, 949 So. 2d 26 (Miss. 2007)* case cited by Steve is not applicable because the Court did not reject the *Guardian ad litem's* recommendations. **There were no recommendations to reject**. The Chancellor addressed her concerns in his opinion, and the Chancellor's opinion should not be disturbed, *Cooper v. Crabb, 587 So. 2d 236, 239(Miss. 1991).*

CONCLUSION

A Chancellor has considerable discretion in utilizing the evidence and making his findings on the best interests of a child in child custody matters. This Court does not override the evidence, retest the credibility of witnesses, nor otherwise act as a second fact finder. This Court needs only to determine if the Chancellor's decision was supported by credible evidence. The desires of the Chancellor should not be disturbed unless the fact findings are manifestly wrong or clearly erroneous. There is no mathematical equation to determine the best interests of the child. The Court applies the Albright Factors to the facts of this case and makes a finding as to the best interests of the child. In this case, the Albright Factors were evenly divided, and the Court made an award of joint custody believing the child's best interests were served by having him with his Mother and sister during the school year and with his Father in the summer.

The Chancellor's award of joint custody was appropriate. The Appellant's assertion that the Chancellor disregarded the *Guardian ad litem's* testimony is misplaced since the *Guardian ad litem* made no recommendations to reject, and the Chancellor addressed her concerns.

The Chancellor's decision should be affirmed.

Respectfully submitted, this the 19th day of February, 2008.

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CERTIFICATE OF SERVICE

I, JAMES P. VANCE, of counsel for the Appellee, Melannie Collins Blaylock Collins, hereby certify that I have this day mailed, by United States mail, proper postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Honorable Malenda H. Meacham
Attorney for Appellant
P. O. Box 566
Hernando, MS 38632-0566

Honorable Mitchell M. Lundy, Jr.
Chancellor
P.O. Box 471
Grenada, MS 38902-0471

THIS the 14th day of February, 2008.

JAMES P. VANCE

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