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**A. The Standard of Review**

Melannie's brief cites *Wright v. Stanley,* 700 So.2d 274, 280 (Miss. 1997) for the proposition that under the manifestly wrong or clearly erroneous standard of review, this court will uphold the Chancellor's findings of fact no matter what evidence is in the record contrary to the Chancellor's findings if there is evidence in the record supporting the Chancellor's findings. However, the actual holding of *Wright* on the standard of review states:

> [i]n order for this Court to say that the chancellor has not abused his discretion in these matters, there must be sufficient evidence to support his conclusions. Id. This Court has also noted that "the 'totality of the circumstances' must be considered." Ash v. Ash, 622 So. 2d 1264, 1266 (Miss. 1993) (citing Tucker v. Tucker, 453 So. 2d 1294, 1297 (Miss. 1984)).

*Id* at 280-281. The *Wright* court then went on to evaluate the totality of the evidence and to find that the Chancellor's "decision was not against the overwhelming weight of the evidence."

**B. The Chancellor's Decision on the Albright Factors**

Melannie's brief claims *Brekeen v. Brekeen*, 880 So. 2d 280, ¶ 4 (Miss 2004), *Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001), *Divers v. Divers*, 856 So. 2d 370 (Miss 2003) and *Watts v. Watts*, 854 So. 2d 11 (Miss App. 2002) have no application to the present case because the facts are different. However, her arguments contain no explanation of how the cases differ or why she thinks they are inapplicable. There is only the unsupported statement that these case are inapplicable.

The principles stated in these cases concerning the law on review of a Chancellor's application of the *Albright* factors are applicable to this case even if the facts are different. The reviewing court does examine the evidence under each factor to determine if the evidence supports the Chancellor's findings on that factor. The reviewing court also reviews the evidence to make sure the chancellor's decision is not based on differences in religion, personal values,

and lifestyles. *Brekeen v. Brekeen*, 880 So. 2d 280, ¶ 4 (Miss 2004) citing *Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001); *Watts v. Watts*, 854 So. 2d 11, ¶5.( Miss App 2002) citing *Hollon,* 784 So. 2d at ¶13. Those principles apply to every initial custody determination regardless of the specific facts.

The *Albright* factors at issue in this appeal are 1) which parent has the best parenting skills, 2) the willingness and capacity to provide primary child care, 3) the stability of the home environment and employment of each parent, and 4) the effect of separating the custody of S.C. and his half sister.

**1. Parenting Skills**

In order to demonstrate the manifest error in the Chancellor's finding that Steve's own witnesses testified that when he gets wound up, he has a temper, it is necessary to quote enough of the testimony using actual names to clarify exactly who is being referred to in the testimony. Throughout the trial, the father was referred to as Big Steve or Steve. The child was referred to as Steven or Little Steve. In her brief, Melannie cites the testimony of Wilton Davis, II at page 183 of the transcript as stating the father is high strung and gets wound up sometimes. A careful reading in context of Mr. Davis' testimony shows that it is the child, not the father, whom he testified is high strung and gets wound up.

Q. Based on knowing Steve and knowing him as long as you have, what would you say big Steve's number one priority is in his life?
A. Right now, his boy.
...
Q. And so now, you say you see him about every day?
A. Not every day. There are some times I see him every day, some weeks I might see him one time.
Q. Where would you see him?
A. We might go out and eat, we talk, we might go to Goodman Road and eat, go shopping.
Q. Where's *Steven*?

A. Sometimes he's with him, sometimes he's at *his mother's house*.
Q. I thought you said something about during the whole time, she only got him three or four times?
A. No. I've been with Steve when they swapped the kids during that time. ...
Q. I think I misunderstood you. You said you went down there with him three or four times to pick the child up?
A. I would be with Steve when they changed *Steven* over. ....
Q. As long as you've known *Steven*, you don't deny that he can, he's got a pretty good temper if he gets upset, do you?
A. He's high strung, he winds up sometimes, sometimes he's all right.

T. 181, lines 2-5, line 29 to p. 182, line 13, lines 23-27, p. 183, lines 5-9. The testimony is the child Steven, not the father Steve, is high strung, gets wound up and has a bit of a temper. There is no testimony from any of Steve's (the father's) witnesses that the father has a temper when he gets wound up. The testimony is the child can be high strung, gets wound up, and has a bit of a temper, and that the father handles the child's temperament by correcting him when its necessary without losing his temper, but is not overly critical when correction is not in order. (T. 178, line 28 to 179, line 20, p. 181, lines 2-5, line 29 to p. 182, line 13, lines 23-27, p. 183, lines 5-9)

On the point of consistency of discipline, Melannie's brief contains no citations to the record in the argument at p.14 for the statement that "Melannie described to the Court how inconsistent Steve was with his discipline. Steve would let things go until he would just blow up." The only reference to record in Melannie's brief about Melannie having concerns about inconsistency in Steve's discipline of S.C. is in the Fact Statement. It states Melannie expressed concerns over Steve's inconsistent parenting and that on one occasion Steve spanked S.C. leaving marks and refers to pages 258-261 of the transcript. Those pages of the transcript say nothing about inconsistent discipline, letting things go, or blowing up. They recount Melannie's memory of an incident when she spoke to S.C. on the phone and he was crying about getting a spanking. Instead of expressing concerns about the consistency of Steve's discipline of S.C.,

those pages express Melannie's concern that her response not be inconsistent with or undermine Steve's discipline because she didn't want S.C. playing his two parents against each other to get out of being disciplined when he did something wrong any more than he already was inclined to do. (T. 258-261; Appellee's R.E. 67-70) When asked specifically about inconsistency of discipline during the marriage, Melannie testified that she couldn't say that either she or Steve was a consistent strict disciplinarian. She also testified that Steve was correct when he testified that S.C. was not the kind of child that required consistently strict discipline and that usually saying something to him or "getting on him" was sufficient for S.C. to recognize what he had done wrong and to correct the behavior. (T. 262)

As pointed out previously in the initial brief, Melannie's friend from Arkansas repeatedly qualified her statements making it clear she had had little opportunity to observe Melannie with her children during the marriage and even less opportunity after the separation. She made it very clear she knew little about Melannie's decision to leave the marital home and her actions in regard to the children in connection with the separation and divorce other than that Melannie followed the instructions of her attorneys. She actually said very little about Melannie's parenting skills. (T. 209, 215, 219, 222, 224, 227)

Perhaps most important of all, the Chancellor did not appear to even consider the concerns expressed by the guardian ad litem about Melannie's parenting skills in light of her actual actions between March of 2005 and November of 2005 even though he specifically stated to Melannie when she was on the stand during the August hearing that he would have to base his judgment as to what would likely occur in the future on her past actions as the best predictor of her likely future actions. (T. 284, line 16 to p. 285, line 13, T 288, line 3-13; R.E. 98-100; Exhibit 6 at p. 52-53; R.E. 129-130; Supp. T. at 4-5; R.E. 16-17)

Thus, the Chancellor's factual findings, on which he based his decision that Melannie had the better parenting skills, are not supported by the record and do not explain why he rejected the guardian ad litem's concerns about Melannie's parenting skills based on her past behavior and statements.

**2. Willingness and Capacity to Provide Primary Care**

The Chancellor's factual findings on which he based his finding that this factor favors Melannie rather than Steve are based on five findings: 1) Steve works two days a *week* more than Melannie; 2) Melannie's work is more flexible than Steve's; 3) Steve's plan to get a second job and an inference it would reduce his ability to provide primary care; 4) Melannie's living in a house next to the school in Pope where her mother is principal and where she has nearby relatives increasing her capacity for child care; and 5) Steve's child care arrangements including paying a friend as a sitter and time spent with his mother, the child's paternal grandmother. (Supp. T. at 5-6; R.E. 17-18) Each of these findings is either unsupported by the record or does not support the conclusion that Melannie has a greater capacity to provide primary care.

The Chancellor's finding that Steve works two days *each week* more than Melannie is clearly erroneous. There is no testimony to that effect and Melannie does not even claim there is any evidence in the record to support a finding that Steve works two day a week more than Melannie. See Melannie's brief at p. 15. Moreover, this finding is clearly inconsistent with the Chancellor's finding under the factor for employment responsibilities of the parents that "[a]s both parents have similar jobs with similar hours, this Court finds that the responsibilities are the same." (Supp. T. at 6; R.E. 18)

The Chancellor's finding that Steve's plan to obtain a second day job would lessen his capacity to provide primary child care is also unsupported by the record. Steve's past action

clearly demonstrates he will not allow a second day job to cut into the time he is available to provide primary care to S.C. He quit a prior second job when his employer wanted him to work shifts outside of S.C.'s school hours. He made it clear in his testimony that any additional job he accepted would have to be during the daytime hours when S.C. was in school. (T. 88, 143; R.E. 69, 71) Thus, Steve's plan does not support any inference or conclusion that his capacity to provide primary child care will be reduced or less than Melannie's.

Moreover, the evidence does not support the Chancellor's finding that Melannie's work is more flexible than Steve's. If anything, the record establishes that Steve's work is both more flexible and more predictable. His schedule is set a year in advance, but his employers allow him the flexibility to spend time with S.C. while he is on call. While he cannot take S.C. to a ball game during one of his shifts because he must have the ambulance with him and he must be free to leave if a call comes in, his employer allows him to take the ambulance to S.C.'s sporting events as long as they are within his on call area. (T. 249; R.E. 94; Exhibit 6 at 29, 34; R.E. 117, 118) Thus, as long as S.C. resides in Hernando, Steve is often available to make parenting decisions and supervise S.C. during his 24 hour shifts even though he has to have someone else to bring S.C. and be available to care for S.C. when calls come in. If S.C. is in Pope, neither of his parents can be available to make parenting decisions, supervise S.C., or spend time with S.C. during his/her 24 hour work shifts.

While Melannie's brief claims her schedule is more flexible, it is not supported by any cites to evidence in the record showing flexibility in Melannie's schedule or work. There is no citation to the record at all for the paragraph on page 6 of the brief which claims Melannie is able to be with her children 24 hours a day, five days a week. This statement is clearly inconsistent with Melannie's own testimony to the effect that her shifts are 24 hours long and she has two

hours of commuting per shift when she works from her Memphis base and four hours of commuting per shift when she works from the alternate base. (T 264-265; R.E. 96-97) Moreover, after 26 to 28 hours of commuting and working as a flight nurse, it is clear Melannie would have to get some sleep. Since she has to leave for the beginning of her Memphis shift at 6 a.m., (T. 264; R.E. 96), with a one hour commute each way and a 24 hour shift, she doesn't get home until at least 8 a.m. the next day, meaning she would have to get some sleep during the time the children are awake. Likewise, the other statement in that paragraph that the children remain in their own home except for the time S.C. goes to his Father is not supported by a citation to the record and is contrary to Melannie's own testimony. Melannie testified when she works on the weekend, she sends her children to stay with family instead of having a sitter come to their home. (T. 265; R.E. 97)

Moreover, Melannie testified someone else sets her schedule a month to six weeks ahead of time and there is no rhyme or reason to what shifts she gets. While it usually works out to about two 24 hours shifts a week, there are times when she works more than two shifts a week or eight shifts a month. She gets schedules that have her work 24 on 24 off 24 on 24 off 24 on and 24 off for a total of three 24 shifts in one week. Although she cannot be scheduled for two 24 hour shifts in a row, one of the conditions of her employment is that she must work extra shifts if necessary and be available to cover for any of the others of her very small team. (T. 248, 250; R.E. 93, 95) As to the comparative flexibility of Steve's job, she testified that while she thought her job was probably more flexible than Steve's, she really didn't know and couldn't say that it was. She testified that both had the ability to swap shifts with someone else after their schedules were set provided they find someone to swap with. She acknowledged that Steve had the flexibility to attend S.C.'s games during his 24 hour shifts. (T. 248-249; R.E. 93-94)

On the issue of extended family expanding the capacity to provide primary care, Melannie's testimony establishes that contrary to the Chancellor's findings, the proximity of the house her mother rents for her to the school in Pope where her mother is principal and her extended family members in Pope do not increase her capacity for child care because all of her family has work responsibilities and she is reluctant to ask them for help or to accept their offers to care for her children. She testified that she is "not the kind of person that takes things from people;" that she "do[es]n't like asking people for favors;" that her "mother has a life too;" and that she "do[es]n't want to tie [her] mother's life up with [her] children." (T. 277) Melannie also admits that the family Steve has made arrangements with to care for S.C. are good caregivers. (T. 277) Steve on the other hand, is not reluctant at all to accept or ask for help from friends or family. He asked a close friend and his wife whose son was also a very close friend of S.C. to care for S.C. during some of his 24 hour shifts and paid them for that care. He readily accepts his mother's offers to spend time with her grandson and care for him any time she wants to but also provides for alternate arrangements so that he is not dependent upon her in his capacity to provide primary care for S.C. In fact, Steve's mother has been involved in providing care for S.C. for some time going back before the separation when she would come to care for S.C. once or twice a month when Melannie and Steve's work shifts overlapped. (T. 15-16, 150, 155, 157, 163; R.E. 33-34, 72, 75, 77, 83)

Melannie's reliance on *Messer v. Messer*, 850 So. 2d 161 (Miss. App. 2003) on this issue is ironic. *Messer* held the presence of an elderly aunt without transportation who had been and was active as a care giver in the child's life should be considered as a positive factor following a divorce. The court held that it would be a dangerous precedent to discount the value of such a presence based on claims of poor health or lack of transportation when there was no evidence

that health or transportation issue rose to the level of creating an unsafe environment for the child. Similarly, it was inappropriate for the Chancellor here to discount the assistance of Steve's mother as a family member caregiver providing care to S.C. in his own home both before and after the separation and instead to prefer Melannie's relatives who had not been a major presence in S.C.'s life prior to the separation particularly when Melannie still expressed a reluctance to ask them for help and rely on them to provide the kind of care S.C. was clearly used to receiving from Steve's mother who is retired and available to help Steve provide care for S.C. any time she is needed. (T. 150-151, 277; R.E. 72-73)

**3. Stability of the Home Environment**

Melannie argues that the Chancellor was correct in finding that this factor weighed in her favor because her home is a single family home in a small town while Steve's home is an apartment and Melannie provides for child care in her home when she is at work whereas S.C. stayed with a family friend instead of at home for ten nights a month while Steve worked. She also argues Steve's mother caring for S.C. while Steve works somehow makes the Hernando home environment less stable. However, when the actual evidence is examined, it shows when Melannie has had custody of her children, she has employed a combination of paid caregivers in her home and sending the children to stay with her relatives outside of her home while she is working. (T. 264-265; R.E. 96-97) Steve has relied on a combination of paid caregivers coming to his home, a relative providing care to S.C. in his home, and paid caregiver friends providing care to S.C. in their home. (T. 147, 150-151; R.E. 72-73)

When it comes down to the realities of family support, the record shows Steve has had the support of a retired family member who has cared for S.C. in his own home whenever she was needed going back to the period when Steve and Melannie were married and living together,

while S.C. had little contact with Melannie's family and Melannie's relationship with her father was admittedly strained. (T. 64, 150-151, 155, 157, 163; R.E. 72-73, 75, 77, 83) Steve's mother is retired with no job responsibilities and is available any time Steve or S.C. need her. (T. 150-151; R.E. 72-73) She has transportation. There was absolutely no evidence she has any health problems, not even the minor ones which the court in *Messer v. Messer*, 850 So. 2d 161 (Miss. App. 2003) held could not be considered as a reason for discounting the stabilizing influence of an elderly aunt on a child's life. (T. 154-163) All of Melannie's relatives, on the other hand, are employed and have other responsibilities which Melannie testified is one of the reason's she is reluctant to ask them for help in caring for S.C. (T. 267-268, 277)

Contrary to Melannie's argument, the only fair reading of the record establishes S.C. has received more care by a family member in his own home since the separation when was residing in Hernando with his father than when he was in Pope with his mother. Furthermore, according to the testimony of both Steve and Melannie as to their future plans for providing care for S.C. when they were at work, S.C. would continue to receive far more care by a family member in his own home if he is permitted to reside with his father. Under *Messer,* the stability Steve's mother contributes to Steve's home environment cannot be discounted where she has transportation and there is no evidence she has health problems which would create a danger to S.C.

When it comes to stability of the physical home, the Chancellor completely ignored the fact that Melannie has no legal right to remain in the home where she is living. She could not even get a lease in her own name. Her ability to reside in that building is contingent on a number of factors completely beyond her control including her mother's continued employment by the school, her mother's continued agreement to use the house herself on those occasions when the demands of her work require her to work late, her mother's continued ability and

willingness to be the named lessee and accept legal responsibility for paying the rent, and the school board's continued willingness to permit her to reside in the house contrary to stated board policy. (T. 194-195; R.E. 87-88) Steve, on the other hand, has a lease on an apartment in a small complex with a playground, a pool, and other single parents who are friends he can rely upon to assist each other in their single parenting responsibilities. (T. 90-91, 96-97)

This is not a situation where the choice is one between a parent with a career schedule permitting her to be available to care for a child personally the entire time the child is out of school and a parent who is unavailable to personally care for the child when the child is not in school. It is a case where the parties both admitted their schedules were approximately equal and the Chancellor found their job responsibilities were approximately the same in his findings under other factors. Then under this factor, the Chancellor completely ignored the fact that Steve's mother had been caring for S.C. in Steve's home even before the separation while Melannie's family was not involved at all in his care until very recently; ignored the stabilizing influence Steve's mother had provided in S.C.'s life and care both before and after the separation; ignored Melannie's testimony concerning her reluctance to ask her family to care for her children during the week while she was working; ignored the testimony of the guardian ad litem that in her investigation she found Melannie's statements to her and her actions when she left the marital home and for at least six months after moving to Pope showed that Melannie had a history of putting her own interests ahead of the best interests of her children; ignored the effect that moving the child to Pope would have on the father's ability to spend time with his child while he was on call; and ignored the S.C.'s school record showing much better school performance while in his father's custody and attending Hernando schools than while at least partially in his mother's custody and attending Pope schools.

Contrary to Melannie's arguments, the evidence does not even support Melannie's contention that her home environment provides for more regular church attendance. The testimony established that neither Melannie nor Steve were regular church goers in the years they lived in Hernando prior to the separation. It is true that when Steve was asked when he started attending the church he currently attends with S.C., he said that it was after the separation. But Melannie also testified that she only began attending the church she currently attends after the separation. (T. 61, 141, 151)

The Chancellor even ignored the clear unstabilizing effect of moving a child in the middle of the school year in order to impose his personal preference for the lifestyle and personal values he saw in Pope over the lifestyle and personal values embodied in Steve's decision to remain in Hernando.

**4. The Issue of Separation of Half Siblings**

Melannie relies upon *Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. 1994) to support her argument that S.C. and his half sister should not be separated. However, in *Copeland v. Copeland*, 904 So. 2d 1066, 1076 (Miss. 2004), a case involving half-siblings, the Mississippi Supreme Court clearly held that *Sellers* demonstrates there is no hard and fast rule in Mississippi that the best interests of a child is best served by not separating siblings. The Court has repeatedly held that the statement in *Mixon v. Bullard*, 217 So. 2d 28, 30-31 (Miss. 1968) that

> The Court shall in all cases attempt insofar as possible, to keep the children together in a family unit. It is well recognized that the love and affection of a brother and a sister at the ages of these children is important in the lives of both of them and to deprive them of the association ordinarily would not be in their best interests.

and reference to this statement in other cases is dicta. See *Bowen v. Bowen*, 688 So. 2d 1374, 1380-1381 (Miss. 1997)

Melannie argues appellate courts have approved of custody awards which allow half brothers and sisters to remain together citing *McWhirter v. McWhirter*, 811 So.2d 397 (Miss. App. 2001). But it is equally true that our appellate courts have approved awards separating half siblings. See *C.W.L. v. R.A.*, 919 So. 2d 267, 273 (Miss. App. 2005) (there is no general rule in this state that the best interest of siblings is served by keeping them together);

In this case the Chancellor stated that he was concerned about the separation of S.C. and his half-sister "on a full-time basis." (Supp. T. 9; R.E. 21) But there is no evidence that an award of custody to Melannie was necessary to avoid separation on a "full-time basis." Regardless of which parent was awarded custody, both made it clear that s/he was in favor of substantial time spent with the other parent. Thus, S.C. would continue to have a substantial amount of time with his half sister regardless of which parent had primary physical custody. The Chancellor stated that he believed that a substantial reduction of the time that S.C. and his half-sister shared the same household would have an adverse effect on both S.C. and his half sister. But there was no testimony that the separation which had already occurred between the time Melannie came back for her daughter in the spring of 2005 and the time of trial in January of 2007 had resulted in any adverse effect on S.C. Furthermore, the best interests of S.C.'s sister were not at issue in this case. There is no evidence in this record, and Melannie cites none in her brief, establishing that S.C.'s best interests would be served by depriving him of the benefits of remaining in the Hernando school and community environment where he had done so well and where his father could spend time with him even when he was on call on his job in order for him to spend more time in his mother's custody with his half sister in Pope.

**C. Whether the Chancellor's Division of Time Supports Joint Physical Custody**

Melannie argues that *Rush v. Rush*, 932 So. 2d 794 (Miss. 2006) is not applicable to the

present case or relevant to the issue of whether the Chancellor's division of time between Melannie and Steve is sufficient to qualify as joint custody because the primary issue in *Rush* was child support. *Rush* clearly addresses the point that an award of joint physical custody requires that the child spend significantly more time under each parent's physical custody and control than the noncustodial parent would have with the child under an award of physical custody to one parent and standard liberal visitation to the noncustodial parent.

> Included in the various types of physical custody which may be awarded by a chancery court pursuant to Miss. Code Ann. § 93-5-24, are joint physical custody and physical custody in one parent or the other. ... [J]oint physical custody may be awarded only where "each of the parents shall have significant periods of physical custody." Miss. Code Ann. § 93-5-24(5)(c). ... Despite the Chancellor's language that Charles and Latresa were awarded joint legal and physical custody, the Chancellor addressed specified periods of visitation for the minor child with Latresa. The Chancellor awarded Latresa the following specified visitation rights to Rosie:
>
> > Otherwise, if not agreed, the mother shall have custody/visitation with Rosie on alternate weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday immediately following, and at those times generally recognized by the court as regular visitation. This will include extended periods during the summer, Christmas, and other holidays, as well as other times generally recognized by the Court as periods of standard visitation. In addition to those generally recognized times, Mrs. Rush [Latresa] shall have custody/visitation with Rosie overnight each week on Tuesday nights, with the mother to enjoy such custody/visitation beginning at the time Rosie gets out of school on Tuesday and ending upon her return to school on Wednesday, and with the mother to be responsible for picking up Rosie from school on Tuesday afternoon and thereafter returning her to school at the conclusion of that visitation period if school is in session the following Wednesday, or to Mr. Rush [Charles] at 8:00 a.m. on the following Wednesday, if school is not in session.
>
> ... Based on the specified visitation period stated, Charles bears the lion's share of time caring for the minor child, Rosie, and as such, has physical custody of the minor child the majority of time. As such, the language in the case sub judice falls woefully short of establishing that Latresa was awarded joint physical custody of the minor child. ... Here, the record reflects that Charles bears the overwhelming responsibility for Rosie's care and welfare. For all practical purposes, Charles was granted physical custody of Rosie subject to Latresa's visitation rights. The terms

> of Latresa's visitation rights are not unusual. Rosie is never solely in Latresa's care for any extended or substantial period of time. As such, under the terms of the Chancellor's order, Rosie is never in Latresa's care long enough to support the Chancellor's award of joint physical custody ... to Latresa.

*Id* at ¶¶ 9, 17-20.

Although there are minor differences between the schedule of time allotted by the Chancellor to Steve and the standard Farese visitation schedule for the noncustodial parent, there is nothing in the terms of the award that is unusual for visitation awarded to a noncustodial parent. S.C. is never solely in Steve's care for more than 12 days at a time. Under the standard Farese visitation schedule, the noncustodial parent has at least three periods of exclusive care in the summer lasting 14 days each. Melannie brief emphasizes "Steve has custody all of the summer months ... except for two (2) weeks to allow Melannie to take the child on vacation." (Appellee Brief at p. 22) But this statement fails to recognize that because school now starts in early August, in reality, under this order Steve gets little more than what is granted to the noncustodial parent during the summer under the standard Farese visitation schedule. The Chancellor's order recognizes that Steve actually only gets weekday summer custody for about 2 months – June and July, with S.C. still spending every other weekend with Melannie during those months. Supp. T. at 12. The standard Farese visitation schedule grants the noncustodial parent six full seven day weeks during the summer.

Melannie also points to S.C. spending every Spring Break with Steve as indicating that the award satisfies the requirements for joint physical custody. While it is true the standard Farese schedule leaves the custodial parent with Spring Break by not mentioning it, the standard Farese schedule grants the noncustodial parent a number of alternating holidays not granted to Steve including Labor Day, and Easter. Moreover, even though the court in *Rush* granted the

mother one night a week every week during the school year, which Steve has not been granted, that extra time was not sufficient to satisfy the requirements of joint physical custody. In short, the minor variations between the schedule granted to Steve and the standard Farese visitation schedule do nothing to distinguish the reasoning of *Rush* or the holding of *Rush* that such a schedule falls woefully short of establishing the requirements for an award of joint physical custody.

**D. The Guardian Ad Litem Issue**

Contrary to the arguments in Melannie's brief, Court of Appeals' reasoning and holding in *Tanner v. Tanner*, 956 So. 2d 1106 (MS App 2007) in regard to guardians ad litem is not applicable to the present case. In *Tanner*, the Chancellor made an initial finding that two factors favored the father, two favored the mother and the rest were equal. After finding that the factors weighed equally, the Chancellor appointed a guardian ad litem for the specific purpose of aiding him in making a decision by reviewing and reporting on the mother's health problems, the father's work schedule and anything that might affect the best interest of the child. *Id* at ¶¶ 2-3. It very clearly was not a situation analogous to examining a child's bruises in the school's offices at 5 a.m. with school officials reporting the matter to DHS or of turning over pictures of bruises on a child as part of discovery in a custody suit which caused the Chancellor to appoint a guardian ad litem for the specific purpose of investigating whether abuse had occurred.

Furthermore, the record does not support Melannie's argument that Steve requested an optional guardian ad litem for purposes of delay. It shows Steve had filed a prior motion in December of 2005 seeking to have the trial held in January of 2006. (R. 29) It also shows the parties agreed in May of 2006 to an August 17, 2006 trial date and that in the May 30, 2006 agreed scheduling order, Melannie represented that her discovery disclosures were complete. (R.

33) Steve requested the continuance because Melannie then filed late supplemental disclosures. (R. 55) Shortly after that continuance was granted, Melannie caused further delay in bringing the matter to trial by discharging her lawyer and hiring other counsel. (R. 38, 44, 45)

The order Melannie relies on for her argument the guardian ad litem was appointed because of Steve's request rather than because one was required by law states only that Steve requested a continuance. It says nothing about Steve requesting a guardian ad litem. It states the court appointed a guardian "due to the supplemental discovery filed by the Defendant [Melannie] in this matter," that the guardian was appointed to "fully investigate" and that the matter was continued until the guardian ad litem has completed the investigation. It ordered Steve to initially pay the guardian's fee and that the matter of the division of the guardian ad litem's fee would be addressed by the court with the case on the merits. (R. 36-37; R.E. 24-25)

In regard to whether appointment of a guardian ad litem was required by law, the guardian testified

> As I understand it, I was appointed to – because of the charges of abuse. I have investigated those, both with the – what was done with DHS and with the school, and found no ground for abuse.

(T. 281, lines 24-24). The Chancellor also made it clear that he appointed a guardian ad litem, not because of anyone's request, but because the supplemental discovery Melannie filed raised issues concerning events which were reported to DHS for possible abuse investigation. When Melannie argue below that no guardian was required, the Chancellor made it clear he was required to appoint a guardian ad litem because DHS had become involved, saying "I don't think you have any choice. Once there's allegations brought by DHS, Statute says you got to." (T. 290: 17-19.) Thus, unlike *Tanner*, the reason for the appointment of the guardian ad litem was not merely to assist the Chancellor in evaluating the *Albright* factors after he had already made

an initial assessment of the factors. The appointment of the guardian ad litem was triggered by discovery disclosures indicating school officials had reported the bruises on the child to DHS for a possible abuse investigation.

An argument similar to the one made in Melannie's brief that appointment of a guardian ad litem was unnecessary was made and rejected in *Foster v. Foster*, 788 So. 2d 779 (Miss. App. 2000). The mother argued a guardian ad litem should not have been appointed under Miss. Code § 93-5-23 because it was just a garden variety custody case. The Court of Appeals found the Chancellor's recollection of testimony of confrontations between the mother and the child and earlier claims by the mother that the father had abused the child were sufficient to find unfounded allegations of abuse had been made by both parents against the other. Despite the mother's protest that it was a garden variety custody case and not an abuse case, the court found the following language from Miss. Code § 93-5-23 was applicable:

> The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court ***shall*** appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney.

*Foster* at ¶¶ 7-8.

Furthermore, Miss. Code Ann. § 43-21-151(1)(c)[1] makes it clear that proceedings with DHS or a Youth Court are not a prerequisite to a Chancellor's duty to investigate possible abuse when the issue first arises in the context of a custody dispute. Chancellors in custody suits step

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[1] "When a charge of abuse of a child first arises in the course of a custody action between the parents of the child already pending in the chancery court and no notice of such abuse was provided prior to such chancery proceedings, the chancery court may proceed with the investigation, hearing and determination of such abuse charge as a part of its hearing and determination of the custody issue as between the parents, notwithstanding the other provisions of the Youth Court Law.

into the shoes of other entities that would otherwise have jurisdiction to conduct such investigations. Thus, the formal opening of an investigation by DHS is not a prerequisite to a Chancellor being required to appoint a guardian ad litem in a custody dispute, especially where the actions of one of the parties resulted in a report being made to DHS concerning physical injuries to a child which the child or a parent claims were inflicted by the other parent.

It is clear in this case that the Chancellor determined Melannie's actions which resulted in a report to DHS were allegations of child abuse despite her later protestations that she was not claiming Steve had abused S.C. The circumstances were such as to warrant the Chancellor's decision that the situation must be investigated. Once he made a determination that allegations of abuse had occurred, he had no choice. The plain language of Miss. Code § 93-5-23 required appointment of a guardian ad litem at that point. Once appointed, the guardian ad litem's role is not limited to investigation of allegations of abuse and a report back to the court of the guardian's findings in regard to abuse allegations. Miss. Code Ann. § 43-21-151 additionally charges a guardian with a duty to

> protect the interest of a child for whom he has been appointed guardian ad litem. The guardian ad litem shall investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest.

The best interest of the child encompasses a much wider scope of inquiry and formation of opinions than the narrow question of whether the child has been abused. The best interest of the child includes all the issues covered by the *Albright* factors.

Under *Floyd v. Floyd*, 949 So. 2d 26, ¶¶7- 8 (Miss. 2007), once the guardian ad litem is appointed as required by Miss. Code § 93-5-23, the Chancellor is required to include a summary of the guardian's qualifications and recommendations in his findings of fact. *Floyd* relied upon the earlier holdings of *S.N.C. v. J.R.D.*, 755 So. 2d 1077 (Miss. 2000) and *Hensarling v.*

*Hensarling*, 824 So.2d 583, 587 (Miss. 2002) as holding a Chancellor must document in his opinion the actions, testimony and opinions of the guardian ad litem. *S.N.C.* explains that when a guardian ad litem is appointed, the Chancellor must ensure that the guardian ad litem protects the best interests of the child. *Hensarling* pointed out that the Chancellor must consider the evidence presented by the guardian, the guardian's views and the reasoning behind the guardian's views. 824 So.2d at 587. *S.N.C.* requires the Chancellor to document each of these considerations. *Floyd,* citing *In re D.K.L.*, 652 So. 2d 184 (Miss.1995), points out the Chancellor's decision must be reversed if the guardian did not fully represent the child's interests. Either the failure to make a recommendation or the failure to zealously represent the child is grounds for reversal. In addition to insuring that the guardian ad litem does zealously represent the child and does make recommendations, the chancellor must include at least a summary review of the guardian's qualifications and recommendations. If the Chancellor fails to include in his findings of fact a summary of the guardian's reasoning, recommendations and qualifications, as well as his reasons for not adopting the guardian's position, the Chancellor's decision must be reversed. *Floyd* at ¶¶ 7-8.

Melannie argues the guardian ad litem made no recommendations, and therefore the Chancellor need not summarize her testimony and opinions in his findings of fact. *Ethridge v. Ethridge*, 926 So. 2d 264 (Miss App. 2006) holds that the findings of a guardian ad litem's investigation and her report of the investigation and findings is the "recommendation" which the Chancellor must address in his findings of fact and conclusions of law. When the Chancellor's "findings" differ from the "findings" of the guardian, the Chancellor must explain his/her reason for differing with the guardian. *Id* at ¶¶ 13-14. During trial, the Chancellor here made it clear he wasn't interested in hearing any more of the guardian's report than her finding that no abuse

had occurred. (T. 281-282)

However, on cross-examination, it became clear that the guardian had made findings on a number of claims, criticism or allegations made by Melannie to support her contention that she should be awarded custody, or at least primary physical custody, and that Steve should not be awarded custody. The guardian ad litem found that Melannie's claims that S.C. was not properly supervised while in Steve's care, particularly in regard to using the pool and the other kids he was allowed to associate with, were unfounded. On the other hand, she found that Melannie's claims that she always put her children first were inconsistent with Melannie's actions between March and November 2005 when Melannie left her children behind and put herself and her finances first. The guardian also had concerns about other inconsistencies between Melannie's testimony in court and what she had found in her investigation. (T. 282-288)

There is no mention of any of this investigation or these findings anywhere in the Chancellor's opinion. The only mention of the guardian ad litem anywhere in the Chancellor's opinion is a statement that there was no proof of abuse, and that therefore, Melannie was ordered to pay the guardian ad litem fee of $1,500.00. There is no summary of the guardian's qualifications. There is no summary of the guardian's views, findings or her reasoning. Contrary to Melannie's arguments, the concerns raised by the guardian ad litem are not addressed in the Chancellor's findings and opinion. He does not mention Melannie's actions in leaving the children behind while taking most of the contents of the home when she left or in putting her financial situation ahead of caring for, and spending time with S.C., during the separation. There is no mention of the fact that the guardian found Melannie's criticisms of Steve's parenting skills to be unfounded. Nor is there any explanation of why the Chancellor disagreed with the guardian's testimony concerning her investigation and findings. Even if the guardian did not

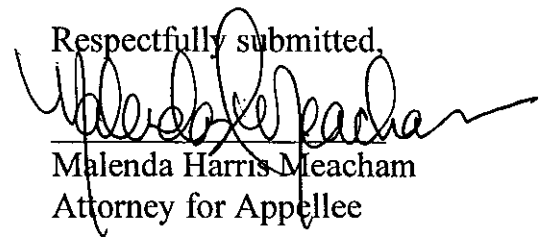
make any recommendation, as incorrectly argued by Melannie, that would not save the Chancellor's decision. *Floyd, S.N.C.* and *In re D.K.L.* all point out that a failure to require the guardian to make recommendations is also grounds for reversal.

## CONCLUSION

When the actual evidence is carefully examined and the totality of the totality of the circumstances are taken into account, it is clear that the Chancellor's decision awards physical custody to Melannie with liberal visitation for Steve. It is also clear that the Chancellor's decision was heavily influenced by several factual findings which are clearly not supported by, and are often directly contrary to, the evidence in the record. It is also clear that the Chancellor did not properly weigh at least some of the *Albright* factors, putting improper emphasis on a number of points which penalized Steve and discounting several other points in Steve's favor which should not have been discounted. To reach his ultimate conclusion, the Chancellor had to make findings which were clearly contrary to some of the findings the guardian ad litem made as a result of her investigation. However, the Chancellor never even discussed the guardian ad litem's testimony, and he clearly did not summarize his reasons for disagreeing with her findings. Most importantly, he completely disregarded Melannie's clear history of putting her own interests ahead of the welfare of her children, the lack of a past history of a close relationship with her family to show that her newfound family environment was stable and likely to continue, the existence of a past history of involvement and support by Steve's mother in S.C.'s life supporting the long term stability of the environment he could offer for S.C., and the guardian ad litem's concerns. The end result was not a proper balancing of the *Albright* factors, but was, instead, the imposition of the Chancellor's personal preferences on lifestyle and personal values. While Melannie's brief argues the evidence supported the Chancellor's

findings, it is woefully short on references to the record, often failing to provide any citation to any support for crucial findings of the Chancellor. As this court has repeatedly held, a Chancellor's decision must be reviewed on the record and arguments in briefs must be supported by references to the record. This court cannot uphold a Chancellor's decision as supported by the record based on arguments not supported by references to the actual evidence in the record. *Pulphus v. State*, 782 So. 2d 1220, 1224 (Miss. 2001). Accordingly, the Chancellor's decision in this case should be reversed and judgment should be entered awarding physical custody to Steve with liberal visitation for Melannie.

Respectfully submitted,



Malenda Harris Meacham
Attorney for Appellee

## CERTIFICATE OF SERVICE

I, Malenda Harris Meacham, attorney for Appellant, Steven W. Collins, hereby certify that I have this day caused to be delivered by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellant, Steven W. Collins to:

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Chancellor Mitchell Lundy
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CERTIFIED, this the 7th day of April, 2008.

Malenda Harris Meacham