IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

APRIL McCULLOUGH	**APPELLANT**
VS.	**CAUSE NO. 2008-CA-00029**
SHANE ALLEN McCULLOUGH	**APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF LINCOLN COUNTY, MISSISSIPPI
CAUSE NO. 2006-0203

REPLY BRIEF OF APPELLANT APRIL MCCULLOUGH

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AMENDED 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 Judges of this Court may evaluate possible disqualifications or recusal.

April McCullough	-	Appellant
Shane Allen McCullough	-	Appellee
W. Brady Kellems	-	Attorney of Record for Appellee
Corey D. Hinshaw	-	Attorney of Record for Appellant
Tiffany M. Graves	-	Attorney of Record for Appellant
William D. Boerner	-	Former Attorney of Record for Appellant
Lesa Harrison Baker	-	Guardian ad litem
Honorable Edward E. Patten, Jr.	-	Chancellor

Respectfully submitted, this the 21st day of January, 2009.

COREY D. HINSHAW

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I. APRIL TIMELY OBJECTED TO AND PROPERLY PRESERVED FOR APPELLATE REVIEW ISSUES RELATED TO THE EXCLUSION OF DEPOSITIONS UPON WRITTEN QUESTIONS.

Shane argues that April's assignments of error as to the depositions upon written questions are waived because she failed to preserve her objections for appeal. This argument is without merit. April objected to the admissibility of the depositions upon written questions at a hearing on May 24, 2007 [T. 346]. She objected to their admissibility again in her Motion in Limine and in the hearing on the same. [R. 229], [T. 404-412]. She also assigned error to the trial court in overruling the Motion in Limine challenging the admissibility of the deposition upon written questions in her Motion to Alter or Amend or, in the Alternative, for a New Trial. [R. 350]. The record is clear that April timely objected to these depositions and properly preserved them for this appeal.

In *Allgood v. Allgood*, 473 So.2d 416 (Miss. 1985), the Mississippi Supreme Court ruled against a defendant who failed to obtain a ruling on his motion for new trial but tried to litigate issues raised in that motion on appeal. Deeming those issues waived, the court held that "[a]s a prerequisite to obtaining review [on appeal] it is incumbent upon a litigant that he not only plead but press his point in the trial court." *Id.* at 423. In the instant matter, April timely filed a motion for new trial that the chancellor ultimately denied. She raised issues regarding the defects of the depositions upon written questions in that motion and discussed the fact that the trial court and guardian at litem should reconsider their decisions without the testimony elicited from the depositions upon written questions. On August 6, 2007, April filed a Motion in Limine in which she moved the court to exclude the written deposition testimony of the foreign deponents. She argued for the same at the start of the trial on August 27, 2007. April clearly "pressed her point" in the trial court with respect

to the exclusion of this testimony. While the trial court may have chosen to ignore some of the issues raised by April, they were nonetheless raised prior to the filing of this appeal. These issues are properly before this Court, and April had every right to discuss them in her appellate brief.

Contrary to Shane's contentions, depositions upon written questions are rarely used by parties in litigation. April would submit that their use in this case makes this matter particularly unprecedented and exceptional. While the Mississippi Rules of Civil Procedure permit the use of depositions on written questions as an acceptable method of obtaining deposition testimony, they are rarely used in litigation. *See* 8A Wright & Miller, *Federal Practice & Procedure* § 2131, p. 22158 ("[depositions on written questions are] more cumbersome than an oral examination and less suitable for a complicated inquiry or for a searching interrogation . . . Accordingly, [they are] used only occasionally."). A review of Mississippi case law reveals only one case that discusses the use of written depositions at the chancery court level. In *Fisher v. Fisher,* 944 So. 2d 134 (Miss. Ct. App. 2006), this Court upheld a chancellor's decision to admit depositions upon written questions in a divorce action where the husband-petitioner, a prison inmate, could not physically be present in court due to his incarceration. The chancellor allowed the written deposition responses in the irreconcilable differences divorce action in lieu of the inmate's physical appearance. The appellate court affirmed the chancellor's ruling. This is the only case where a chancellor has been asked to decide on the admissibility of written depositions. The *Fisher* case is drastically different and distinguishable from the case at bar. The instant case involves written depositions of multiple foreign deponents whose testimony was given substantial weight and was particularly prejudicial and damaging to April in the court's child custody analysis. Thus, April would accordingly ask this Court to carefully consider the arguments raised herein and in her original brief with respect to why this testimony should have been excluded from the evidence presented at the trial on this matter and

even if allowed why such testimony should not have been afforded so much weight.

Shane would have this Court believe that the instant matter is the perfect example of when depositions upon written questions should be used. (Brief of Appellee, p. 16). However, his assertion clearly ignores the nature of this litigation; that is, he disregards the fact that what is at stake here is whether one parent should be given full physical and legal custody of the parties' children to the exclusion of the other. With the exception of their responses to the depositions upon written questions, the foreign deponents were far removed from this litigation. The Chancellor was never able to ascertain their credibility and accordingly ascribe weight to the evidence they provided through their testimony. Nevertheless, Shane called upon these individuals to provide testimony on highly sensitive issues related to custody and the Chancellor never questioned the legitimacy of that testimony.

Determining custody is a complicated inquiry for which depositions upon written questions is arguably inappropriate in any circumstance but especially given the procedural concerns in this instant, the objectionable nature and form of the questions, and damaging and prejudicial allegations contained in the responses about which April never had an opportunity to confront her accusers. Contrary to what Shane argues, the instant matter is not illustrative as a case when such depositions should have been used. This case is exceptional in that the Chancellor allowed in this testimony while being fully apprised that April never confronted these witnesses with cross-examination questions of her own. Aside from the procedural issues that doomed the depositions upon written questions from the beginning, it stands to reason that the Chancellor could have excluded this testimony or limited the extent to which it would be admitted as evidence. He did neither. April was denied the opportunity to confront these witnesses because their depositions had already been taken by the time April received the Amended Notices. In the interest of equity, the trial court should have

excluded this testimony, continued the matter until such time as April could have cross-examined these witnesses or allowed her an opportunity to confront the witnesses or, at the very least, not afforded the written deposition responses such significant weight in making its ruling as to custody.

II. APRIL PRESERVED FOR APPEAL ISSUES RELATED TO THE RELIANCE OF THE CHANCELLOR AND THE GUARDIAN AD LITEM ON THE TESTIMONY ELICITED FROM THE DEPOSITIONS UPON WRITTEN QUESTIONS.

Shane tries to argue that neither the Chancellor nor the guardian ad litem relied heavily on this testimony. Nothing could be further from the truth. Shane again argues that April failed to raise this issue prior to this appeal. Once again, Shane is incorrect. In her motion for a new trial, April says "the Court [gave] inequitable weight to the effect of depositions on written questions" [R. 354] and that "the GAL erred in giving insufficient weight and worth to the written depositions admitted into evidence over Plaintiff's objection (and which should not have been considered)." [R. 359]. The inclusion of these issues in April's motion properly preserved them for appellate review. In addition, April filed the Motion in Limine to exclude this testimony because she anticipated that the trial court might accord substantial weight to these depositions. The issues April has raised on appeal with respect to the reliance of the court and the Guardian ad litem on the depositions are properly before this Court.

To refute April's contentions about the court's reliance on the written depositions, Shane says that if he were "to voice his dissatisfaction, it would be that the Chancellor did not place nearly enough weight on the evidence in the depositions upon written questions." (Brief of Appellee, p. 16). Shane makes this statement after recalling that the Chancellor "made only passing references to the depositions by written questions." *Id.* The court's ruling and the Guardian ad litem's final report are replete with references to the depositions upon written questions, even though April soundly denounced each of the witnesses deposed upon written questions throughout the trial. The

Chancellor twice references the depositions in his analysis of the continuing care of the children before separation and his analysis of the moral fitness of the parents is comprised almost exclusively of this testimony. In fact, the Chancellor addressed the testimony of each witness who offered written deposition testimony to substantiate his finding favoring Shane under the moral fitness factor. It simply cannot be argued that these depositions did not have a substantial impact on the Chancellor's ruling.

The depositions upon written questions had a similar effect on the Guardian ad litem. When asked by April's counsel whether she gave the same weight to the written depositions as she did the witnesses who appeared in person to testify, the Guardian ad litem answered affirmatively. She specifically assigned weight to the written deposition testimony of four foreign deponents who made allegations about April's conduct and behavior while in Italy who the GAL never interviewed or had any opportunity to evaluate their credibility or veracity. All of this testimony was accepted by the court and the GAL as credible and relied upon heavily despite April's denial of such conduct and despite any similar evidence of such behavior at any time while April was in the United States. The Guardian ad litem ultimately recommended that Shane obtain physical custody of the parties' children – a recommendation the trial court endorsed and even exceeded in awarding Shane full physical *and* legal custody. In accordance with the arguments raised in this appeal, April would ask this Court to reverse the lower court's decision to admit these depositions, which were improperly and inequitably weighed by the Chancellor and Guardian ad litem.

III. APRIL PROPERLY PRESERVED FOR APPELLATE REVIEW ISSUES RELATED TO THE CONTENTS OF THE GUARDIAN AD LITEM'S REPORT.

Shane once again argues that April did not object to the Guardian ad litem's report prior to the filing of this appeal. Shane's contention is again without merit. In her motion for new trial,

April discussed the fact that the Guardian ad litem's report and testimony were "inconsistent by comparison and wholly unsupported by the credible evidence in [the] record." [R. 358]. In that same motion, April disavowed the Guardian ad litem's recommendation "slightly favoring" Shane for custody because her report clearly reflected the fact that most of the *Albright* factors favored April and not Shane. The Guardian ad litem's report and testimony at trial contradicted her recommendation and, as such, April raised her concerns about the trial court's reliance on that recommendation. April properly preserved issues related to the Guardian ad litem's report for appellate review by discussing the report, at some length, in her motion for new trial.

Shane also takes issue with the fact that April provided no authority for asking the Court to take judicial notice of the fact that guardian ad litems are not required to submit their reports in enough time to allow parties an adequate opportunity for review and response. April would submit that she put this Court on notice of this fact because no authority or guidelines currently exist. The instant matter is illustrative of a case when the late submission of a guardian ad litem's report could deprive a party of the opportunity to effectively examine the guardian ad litem at trial. Accordingly, April reiterates that this Court should take notice of the fact that guidelines with respect to the submission of reports do not currently exist in this state and, as in the case at bar, can have the result of extreme prejudice to a party.

Shane rejects April's suggestion that such guidelines be established by contending that it is "common practice in domestic relations case that guardians ad litem reserve making a final recommendation until trial testimony and other evidence introduced is considered" and that to set an "arbitrary mandated deadline for the guardian ad litem to submit his or her report . . . would be to deprive the guardian ad litem of the opportunity to hear the witnesses and other evidence introduced at trial." (Brief of Appellee, p. 17). Shane's argument against the imposition of

guidelines with respect to these reports fails for two reasons. First, April is not suggesting "arbitrary" deadlines for these reports. Rather, she is putting the Court on notice that, as it is now, parties, like the instant ones, may be disadvantaged and prejudiced to the extent that a guardian ad litem waits until the last day of trial to submit her report with the content of the interviews, her assessment of those interviews and her ultimate findings of fact and opinions as to the issues at trial. April was denied an adequate opportunity to consider the final report of the guardian ad litem and adequately cross-examine her regarding said report as well as offer witnesses rebutting the GAL's findings.

Shane's argument also fails because, here, the Guardian ad litem admitted that the final report was "limited to my investigation . . . [and was] not intended to include trial testimony or any of the documentation that was presented during the trial unless, of course, they were the same documents I reviewed during my investigation prior to trial." [T. 1403 (emphasis added)]. Put simply, it is not clear why the Guardian ad litem waited until the last day of trial to submit her final report. The late submission of the report prejudiced April and, in the interest of equity, the Chancellor should have disregarded the final report or, in the alternative, recessed the trial for a long enough period of time to allow the parties to effectively review the document, prepare their examinations and call witnesses, if they so chose. The trial court instead only granted the parties a "brief recess" to review the report. [T. 1404]. April submits that the Chancellor could have exercised his discretion to allow the parties more than a brief recess for their review and that, by not doing so, he committed manifest error resulting in extreme prejudice to April and not ultimately in the best interests of the children.

IV. LESS DEFERENCE SHOULD BE GIVEN TO THE TRIAL COURT'S CONSIDERATION OF THE WRITTEN DEPOSITION TESTIMONY

Even if this Court does not find the Chancellor's admission and consideration of the written

deposition testimony of the foreign deponents to be improper, April asserts that as a matter of equity less deference should be given to the Chancellor's consideration of this testimony as he does not sit in any better position to consider such testimony. In the instant case, the chancellor's "proximity to the witnesses and ability to view their manner and demeanor" does not provide him with an "infinitely superior vantage point" as in other child custody cases. *See Lorenz v. Strait*, 987 So. 2d 427, 433 (Miss. 2008). The chancellor and guardian ad litem afforded great weight to the testimony offered via the written depositions of foreign deponents. However, neither April nor the chancellor ever had an opportunity to confront these witnesses. Also, the chancellor never had an opportunity to actually evaluate and consider the demeanor, manner and credibility of the foreign deponents. Therefore, the reasoning behind the abuse of discretion and manifest error standard of review in most chancery court matters is not as compelling in this exceptional instance; therefore, less deference should be afforded to the chancellor's consideration of the written deposition testimony.

V. THE LOWER COURT ABUSED ITS DISCRETION AND/OR COMMITTED MANIFEST ERROR IN IMPROPERLY CONSIDERING AND APPLYING THE *ALBRIGHT* FACTORS

Shane asserts throughout his brief that April's appeal seeks only to have this Court re-weigh the facts and re-litigate this matter on appeal.[1] This assertion is without merit. The crux of April's appeal argument is that this is an exceptional case involving damaging written deposition testimony of foreign deponents which were given significant weight by the chancellor despite objection at the trial court level. Moreover, the Chancellor committed manifest error and abused his discretion in

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[1] Shane's brief also unfairly and improperly mischaracterizes the arguments in April's brief as being impertinent and direct attacks on the chancellor. Such accusations are improper, inappropriate and should not be permitted. Arguments in support of April's appeal necessary to show how the lower court abused its discretion are not direct, personal attacks on the chancellor and should not be construed as such.

not fairly and equitably applying and analyzing the factors enumerated in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) and in granting full physical and legal custody to Shane. Shane asserts in his brief that the standard of review and prior precedent suggest reversal is not proper. April acknowledges the standard of review applicable to this case is limited, however, "[w]here the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error." *Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001). Also, "[w]hile our chancellors are granted the broadest discretion in such matters, it is not absolute and sometimes the best intentions of the chancery judge result in an abuse of discretion and a clearly erroneous application of the law." *Caswell v. Caswell*, 763 So. 2d 890, 896 (Miss. Ct. App. 2000)(concurring in part, dissenting in part). Though the trial court's ruling was extraordinarily lengthy, that fact alone does not absolve the possibility that the chancellor committed manifest error and/or an abuse of discretion in his application and consideration of the *Albright* factors as Shane implied in his brief. The lower court's ruling was not based on substantial and credible evidence but rather relied on isolated incidents, incomplete facts and inconsistent findings to favor Shane and ignored substantial and credible evidence favoring April. Much like the case of *Watts v. Watts,* 854 So. 2d 11, 13 (Miss. Ct. App. 2003), the chancellor below "completely discredited any testimony citing to the fact that [April] is a good mother and only focused on unsubstantiated testimony against [April]." The lower court ignored evidence supporting April as the preferred custodial parent. Lastly, the court applied erroneous legal standards throughout its *Albright* analysis and/or erroneously or inappropriately applied the correct legal standard.

The chancellor's ruling is clear that he did not *specifically* find a single factor in favor of April. Even if each incidence of error alone does not rise to the level of manifest error, certainly the cumulative effect of the error in the trial court's *Albright* analysis amounts to manifest error and an

abuse of discretion warranting reversal. The cumulative effect of the erroneous application of the *Albright* factors amounts to an abuse of discretion which resulted in extreme prejudice to April and an award of custody not in the best interest of the children. *See Sheffield v. State*, 844 So. 2d 519, 525 (Miss. Ct. App. 2003). The Chancellor's analysis, findings and rulings are inconsistent and hold the parties to different standards. The Chancellor places too much emphasis on objectionable and prejudicial written deposition testimony of foreign deponents who April never had an opportunity to confront as well as too much emphasis and weight on the interests of the paternal grandparents, the time when April took the girls to Maine prior to their being any actual custody dispute and on Shane's post-separation care of the children to the exclusion of April's primary– if not sole–care during the course of the marriage.

A. THE LOWER COURT PLACED TOO MUCH EMPHASIS ON CERTAIN FACTORS AND INFORMATION

The chancellor abused his discretion in awarding full physical and legal custody of the girls to Shane by placing too much emphasis on alleged conduct and behavior of April contained solely in the written deposition testimony of foreign deponents. *See Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001) (reversing custody ruling because chancellor placed too much fitness on homosexual relationship of mother and moral fitness factor). An overwhelming amount of weight was placed on the written deposition testimony of the foreign deponents by the trial court, especially in the court's analysis of the factors regarding the age of the children, continuity of care (which the court states overlaps with willingness and capacity and parenting skills) and moral fitness. [R.E. 0055, 0057, 0071-0072; R. 307, 309, 322-24]. Shane's brief insists that "the Judge only made passing references to the depositions by written questions," and that "the chancellor did not place nearly enough weight on the evidence in the depositions upon written questions." (Brief of Appellee, p.

16). As has been adequately discussed above, a review of the court's ruling containing numerous direct and indirect references to the written deposition testimony of the foreign deponents clearly illustrates that the lower court made more than mere passing references to this testimony. Moreover, Shane references the testimony from the written depositions throughout his brief in an attempt to support the chancellor's *Albright* analysis all the while attempting to argue the insignificance of the same.

The chancellor also abused his discretion by placing too much emphasis on April's actions of taking the girls to Maine which occurred *before* custody was ever contested by Shane. The court placed excessive weight on the fact that April took the girls to Maine in October 2006. In fact, the lower court's rulings have consistently favored Shane since the time of the emergency TRO hearing requested by Shane up through the trial of this matter. This is evidenced initially by the court's failure to allow April to attend the TRO hearing telephonically or to continue the hearing until such time that she could return from Maine to defend herself. The court granted the TRO and Shane's request for physical and legal custody without any facts in the pleading indicating that such a hearing was necessary or that the girls would suffer any "immediate and irreparable injury, loss or damage." Miss. R. Civ. P. 65(b). The record is clear that Shane was not even living in Mississippi at the time as he was working in Charlottesville, Virginia and was only home every third week at most. Further, there was no proof that April in any way prevented Shane from visiting the girls or speaking with the girls on the telephone. April did not in any way "secrete" the children or "abscond" with the children as Shane suggests in his brief. Rather, while en route to Maine, the record is clear that April's mother, Diane Biggar, contacted Shane via telephone and notified him that April and the girls were going to her brother's home in Maine. [T. 693-94]. Additionally, the chancellor failed to point out that when April left with the girls to Maine, the divorce which she filed had not been answered

or contested in any way by Shane. Thus, custody was not in dispute. It was only after Shane learned that April and the girls were in Maine that he contested the divorce and requested a TRO. The court awarded Shane physical and legal custody of the girls from that point on, reaffirming the ruling at the preliminary injunction hearing and again at the trial of this matter. The chancellor viewed April with disfavor from early on and failed to consider that April's actions were an effort to seek the comfort and solace of her own family members during this obviously volatile and vulnerable time in her life. April was isolated and alone with the girls on property virtually adjacent to Shane's parents, Pat and Peggy McCullough, and her only immediate family were in Canada and Maine. She also testified that she was intimidated by her father-in-law, Pat McCullough, who is also an attorney. [T. 73].

The court also places excessive emphasis on the role of the paternal grandparents in the lives of the children. April acknowledges that such extended family care is often viewed favorably but contends that the lower court failed to acknowledge the evidence suggesting that the girls were far too often in the care of the paternal grandparents when with their father. [T. 219-20, 922, 963-64]. This is a fact in evidence even acknowledged in the guardian ad litem report, which also states that the girls were often in the care of the paternal grandparents when Shane was not around and that the girls slept in the beds of the paternal grandparents. [R.E. 00109]. The lower court extensively discussed every piece of evidence regarding any care Shane had ever provided for the children yet ignored evidence that the girls were too often in the care of the paternal grandparents during Shane's time with them. Further, April points out the inherent inconsistency in the lower court's emphasis on the importance of the paternal grandparents in the girls' lives and how this relationship weighs in favor of Shane yet does not acknowledge that Shane no longer lives in Lincoln County like his parents and April but rather at least 3 ½ hours away in Ocean Springs. Though Shane does have

family in Lincoln County, this factor should not favor Shane because he lives in Ocean Springs and April lives in Lincoln County. *See Watts v. Watts*, 854 So. 2d 11, 15 (Miss. Ct. App. 2003).

The chancellor also placed significant weight on his belief that April's failure to notify the girls' paternal grandparents upon going to Maine constituted poor parental judgment. He also ruled that she exhibited poor parental judgment by not voluntarily facilitating visitation with the paternal grandparents on her weekends, which is particularly egregious and inequitable abuse of discretion considering that the chancellor had already awarded Shane temporary physical custody of the girls. [R.E. 80 ; R. 332]. The court also weighed April's decision to put the children in daycare instead of leaving them in the daily care of the paternal grandparents against her yet never considers the obvious fact that the children would have no choice but to be put in daycare if living with their father in Ocean Springs. Further, the chancellor surmises that April's choice to put the girls in daycare instead of leaving them in the daily care of Peggy McCullough was poor parental judgment. [R.E. 80 ; R. 332]. The chancellor abused his discretion and committed manifest error as to these findings because Pat and Peggy McCullough are not parties to this custody action and should not be afforded greater weight or consideration than April who is the mother of the children. "Parents with custody have a paramount right to control the environment, physical, social, and emotional, to which their children are exposed." *Stacy v. Ross*, 798 So. 2d 1275, 1280 (Miss. 2001).

B. THE LOWER COURT'S CUSTODY RULING IS UNFAIRLY PUNITIVE TO APRIL

"The Mississippi Supreme Court has held that it is unacceptable for chancellors to use custody decisions as a way to punish a parent for her [alleged] indiscretions." *Weeks v. Weeks*, No. 2006-CA-01265-COA ¶9 (Apr. 29, 2008). The chancellor's rulings appear to have been motivated by an attempt to punish her for her the conduct and behavior alleged against her in the written

deposition testimony of the foreign deponents and for taking the girls with her to Maine even though there was no custody in dispute at the time and no order in place preventing her from doing so. This Court has also stated that "custody decisions are not made with the object of rewarding or punishing either parent, but only upon factors relating to the child's best interest." *Horn v. Horn*, 909 So.2d 1151, 1161 (Miss. Ct. App. 2005)(citing *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984). Therefore, the chancellor abused his discretion by punishing April and rewarding Shane as a result of April's alleged indiscretions. The consistent custody rulings against April and in favor of Shane as well as the court's ultimate denial of joint legal custody of the children to April is unfairly punitive and an abuse of discretion.

C. THE CUMULATIVE EFFECT OF THE ERRORS AND INEQUITIES IN THE LOWER COURT'S RULING AMOUNT TO MANIFEST ERROR AND/OR AN ABUSE OF DISCRETION WARRANTING REVERSAL

As has been discussed in detail above and in April's initial brief, numerous errors and inequities exist in the lower's courts ruling as to custody in this matter. The cumulative effect of these errors and inequities amount to manifest error and/or an abuse of discretion warranting reversal of the court's award of full physical and legal custody of the girls to Shane. April additionally assigns error to the trial court in that the chancellor inexplicably placed excessive weight on occasional incidents of care of the girls by Shane while virtually ignoring the continuing care of the girls by April and her capacity to care for the girls. These occasional acts which were given overwhelming weight by the lower court in favor of Shane simply do not outweigh April's proven record of continued care for the girls. Shane asserts in his brief that April "misapprehends" the continuity of care factor and states that "[c]ontinuity of care overlaps with the willingness and 'capacity' factor and clearly encompasses *ability* to provide primary care." (Brief of Appellant, p. 30). It goes without saying that whether a parent has the ability to care for children and whether a

parent is the primary caregiver or the one who has provided continuing care are not the same thing. Therefore, analyzing the continuity of care factor as to whether a parent has the ability alone is clearly erroneous. There is no justification in the record for the Chancellor's ruling that "*if* this factor favors either party, it would only slightly favor April due to the stay-at-home mom status she maintained for several years." [R.E. 0060-0061; R. 312-13].

It also defies reason that the chancellor would grant Shane physical and legal custody of the children in an initial temporary hearing and then weigh that period of time so significantly in favor of Shane and against April. Too much emphasis was placed on this post-separation period of time, particularly the period of time Shane was the primary custodian by order of the court. The chancellor abused his discretion and committed manifest error by not considering the pre- and post-separation periods of time equally and giving one no more weight than the other. *See Caswell v. Caswell*, 763 So. 2d 890, 893 (Miss. Ct. App. 2000).

Also, under the willingness and capacity factor, the chancellor erred by failing to consider the living arrangements afforded to the children. April's corroborated testimony was that she lives in a three-bedroom house with a fenced yard. Shane, however, lives in a two-bedroom apartment in a multi-level apartment complex in Ocean Springs near a major thoroughfare. Also, the girls have separate bedrooms of April's house which she has specifically decorated. At Shane's apartment, however, the girls must share a bedroom. [R.E. 00107]. Shane's apartment is obviously less suitable than April's house in Brookhaven yet this was given no consideration in the trial court's *Albright* analysis. *See Jordan v. Jordan*, 963 So. 2d 1235, 1241 (Miss. Ct. App. 2007).

The chancellor also erred by failing to find neither the age factor nor the sex factor in favor of April. April acknowledges that the factors involving the age and sex of children are not alone dispositive of the custody determination and do not alone warrant reversal. However, the fact that

both children are girls and were not yet three years old and five years old at the time of divorce should have weighed in favor of April because "the tender years presumption is still a viable consideration." *Webb v. Webb*, 974 So. 2d 274, 277 (Miss. Ct. App. 2008). It is less of a consideration for a male child. *Id.* That the children are arguably of tender years and girls is an important consideration and will continue to be so as the girls get older. *Steverson v. Steverson*, 846 So. 2d 304, 306 (Miss. Ct. App. 2003). The age and/or sex factors should have favored April especially in light of the fact that there is no substantial, credible evidence suggesting otherwise. The citing of isolated examples of alleged care of the children by Shane at different times does not overcome the presumption that April is best suited to care for children. *See Lee v. Lee*, 798 So. 2d 1284, 1289 (Miss. 2001).

Under the stability of the home environment factor, the trial court erroneously and unfairly noted that this is April's third marriage. April's previous marriages were also reiterated in Shane's brief as somehow inexplicably significant. Neither the chancellor nor Shane, however, are able to suggest how April's prior marital history makes her home environment less stable or has any adverse impact on the children whatsoever. Also, the court fails to mention that April had no children from her previous marriages or the bases for her previous divorces. Though the court did not specifically find this factor to favor either party, the inference that April's home environment is less stable as a result of her previous marriages is an abuse of discretion.

Lastly, the chancellor heavily weighed the conduct and behavior alleged against April in the written deposition testimony yet fails to acknowledge or consider that these allegations, which were completely denied by April, did not involve conduct or behavior to which the children were ever exposed or by which the children were ever adversely impacted. *See Lorenz v. Strait*, 987 So. 2d 427, 433 (Miss. 2008). Furthermore, the only corroborating photograph in evidence referenced by

the court depicts nothing more than April with a glass of wine and glass of water and does not corroborate the conduct and behavior alleged against her.

The cumulative effect of the pervasive error throughout the trial court's ruling granting Shane McCullough full physical and legal custody of the parties' two girls amounts to an abuse of discretion and/or manifest error that warrants reversal of the trial court's ruling.

CONCLUSION

As a result of the aforementioned assignments of error and those more thoroughly discussed in the initial Brief of the Appellant and/or the cumulative effect of the trial court's error, April McCullough respectfully requests that the chancellor's award of full physical and legal custody to Shane McCullough be reversed as well as the chancellor's finding that she be responsible for all health care expenses of the children not covered by insurance. Alternatively, April McCullough prays that this Court will reverse the chancellor's award of legal custody to Shane and award joint legal custody of the children to both parties.

This, the 21st day of January, 2009.

Respectfully submitted,

APRIL MCCULLOUGH

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CERTIFICATE OF SERVICE

I, Corey D. Hinshaw, attorney of record for the Appellant, do hereby certify that I have this day mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing to the following:

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Honorable Edward E. Patten, Jr.
Lincoln County Chancery Court Judge
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This the 21st day of January, 2009.

COREY D. HINSHAW