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

BRIEF OF APPELLANT APRIL MCCULLOUGH

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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 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
Honorable Edward E. Patten, Jr.	-	Chancellor

Respectfully submitted, this the 11th day of September, 2008.

COREY D. HINSHAW

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STATEMENT OF THE CASE

I. Statement of the Case

A. Nature of the Case and Course of the Proceedings

On March 27, 2006, the Appellant, April McCullough, hereinafter April, filed her Complaint for Divorce and for Temporary Relief in the Chancery Court of Lincoln County, Mississippi, against the Appellee, Shane McCullough, hereinafter Shane. [R. 002]. The parties were married on June 23, 2001 and finally separated on January 7, 2006, at which time Shane left April and the girls on the side of the interstate enroute to the airport and advised April he did not want her or the girls to return with him to Italy. As a result of the marriage, two children were born unto the parties. Lindsey Elizabeth McCullough, hereinafter Lindsey, was born on November 1, 2002. Caitlin Angela McCullough, hereinafter Caitlin, was born on October 29, 2004. April amended her Complaint on July 31, 2006 to include a count for the partition of certain real property. [R. 021].

On October 27, 2006, Shane filed a Counter-Complaint that included a demand for a restraining order and an injunction granting him full custody of the children. [R. 039]. Custody of the children was not in dispute until the filing of Shane's Counter-Complaint. [T.1291]. The Chancery Court held a temporary restraining order (TRO) hearing on November 2, 2006 wherein full temporary custody of the children was placed with Shane. [R.050]. On November 8, 2006, April filed a Motion to Dissolve Temporary Restraining Order or, in the Alternative to Stay Judgment Pending Interlocutory Appeal. [R. 052]. Shortly thereafter, on November 17, 2006, April filed a Motion for Recusal which was later withdrawn. [R. 063, 105]. Shane filed a Response to the Motion for Recusal and Counter-Motion for Sanctions on November 20, 2006. [R.084]. On December 14, 2006, Shane filed his Answer to April's First Amended Complaint. [R.107]. April filed her Response to the Counter-Complaint and her Response to Shane's Petition for Citation of Contempt on December 14, 2006. [R.112, 116]. On December 15, 2006, the Chancery Court entered an Order Granting Temporary Relief ordering Shane physical custody of the girls. [R.132]. Subsequently, Shane insufficiently noticed Depositions on Written Questions to five foreign deponents on February 21, 2007. [R.134-143]. The notices were subsequently amended and filed on March 19, 2007. [R.154-165]. On May 8, 2007, the Chancery Court entered an Order Denying Sanctions, Modifying Temporary Relief, and Adjudicating Contempt. [R.207].

On May 17, 2007, Shane filed a Motion for New Trial on Limited Issues, Motion to Modify Summer Visitation and Other Relief. [R. 212]. April filed a Response to that Motion on May 24, 2007. [R. 218]. The Chancellor entered an Order appointing Lesa Baker as guardian ad litem on May 31, 2007. [R. 221]. The guardian ad litem filed her Preliminary Report on June 28, 2007, but gave no findings or recommendations at that time. [R. 238]. April filed a Motion *in Limine* on August 6, 2007 to exclude the depositions on written questions. [R. 228]. The Chancellor

subsequently denied April's Motion. [R. 411]. On September 11, 2007, the parties entered into a Consent Agreement wherein they agreed to a divorce on the ground of irreconcilable differences. [R. 241]. The six or seven-day trial of this matter commenced on August 27, 2007 until August 31, 2007, and recessed until September 17, 2007, recessed again and concluded on September 27, 2007. The Chancellor read his ruling into the record on November 5, 2007. [R.0013; R.265]. The Chancery Court entered a Final Judgment of Divorce on November 19, 2007 awarding Shane legal and physical custody of the children with April given only reasonable visitation rights. The Chancellor provided no justification for why April was not awarded joint legal custody of the children. [R.E. 004; R. 262]. On November 29, 2007, April filed a motion to Alter or Amend, or in the Alternative, for a New Trial. [R.350]. The Chancellor denied that motion on December 6, 2007. [R.374]. The Chancellor also required April to pay all of the children's medical expenses not covered by insurance. The award of custody of the minor children to Shane is the subject of this appeal in addition to the court's requirement that April pay all of the girls' uninsured medical expenses.

B. Statement of the Facts

At the time of trial, Lindsey and Caitlin were age five and three years, respectively. April filed her Complaint for Divorce and for Temporary Relief on the grounds of desertion or constructive desertion, or in the alternative, on habitual cruel and inhuman treatment. [R. 002]. At various times throughout their marriage, Shane's employment required him to be away from the family for extended periods of time. In April of 2003, five months after Lindsey was born, Shane took a job with Carnival Cruise Lines and moved to Mestre, Italy. [T. 421, 1034]. April and Lindsey joined him on May 8, 2003. [T. 421, 1034]. April had been working at King's Daughters Medical Center as an Occupational Therapist in Brookhaven, Mississippi. [T. 414, 714]. She became a stay-at-home

mother when the family moved to Italy. [T. 421, 422]. April and Lindsey returned to Ruth, Mississippi, on July 31, 2003. [T. 1035]. On or about August 10, 2003, Shane returned to Mississippi. He stayed at home for around twenty days before returning to Italy. [T. 422]. April was alone in Mississippi with Lindsey until the two joined Shane in Italy on or around October 20, 2003. [T. 424, 1040]. The family spent the holidays together in Italy and April and Lindsey returned to Mississippi on February 28, 2004. [T. 1041]. April stayed at home with Lindsey from February 28, 2004 until April 18, 2004, when the two returned to Italy to be with Shane. [T. 1041].

On July 31, 2004, the entire family returned to Ruth, Mississippi. [T. 1041]. On August 23, 2004, Shane returned to Italy, and on or about the first of September 2004, April and Lindsey went to Canada to stay with April's mother. [T. 427]. On October 29, 2004, April gave birth to their second daughter, Caitlin. [T. 416, 1043]. The couple decided that April should give birth to Caitlin in Canada because they did not have health insurance and because April required a Caesarean section. [T. 426]. Shane arrived in Canada on October 28, 2004 and stayed only one week before returning to Italy. [T. 427]. April remained in Canada, with Lindsey and Caitlin, until November 13, 2004. [T. 427]. April, Lindsey, and Caitlin returned to Mississippi on November 24, 2004. [T. 430]. The family returned to Italy sometime after the holidays that year. In January of 2005, Caitlin and Lindsey had to be hospitalized and both parents shared responsibility for their care. [T. 1049]. With the exception of brief trips to Mississippi, the family remained in Italy until October 30, 2005, when April and the children returned to Ruth. [T. 1055]. Shane did not return to Mississippi until around Christmas time that year. [T. 1060]. Throughout their stay in Italy, April was a stay-at-home mother and assumed primary care for the children while Shane worked. [T. 434].

The parties separated on January 7, 2006, the same day on which Shane returned to Italy. [T. 435, 1061]. Shane started his employment with Sperry Marine in Charlottesville, Virginia on

March 27, 2006. [T. 1071]. April filed for divorce on that same day. [T. 438, 1281] Shane was away from home from March 27, 2006 until October 26, 2006. [T. 438, 1072]. At all times prior to Shane's return, April was with the children as their primary, and largely sole, caretaker and custody of the children was not in dispute. [T. 1291]. Shane filed his Counter-Claim on October 27, 2006 asserting for the first time, his interest in obtaining custody of Lindsey and Caitlin. [T. 1291].

On November 2, 2006, the Chancellor granted temporary custody of the children to Shane, having prohibited April from participating in the hearing on this matter by telephone, despite her attorney's insistence that she was standing by and ready for a call. [T. 3]. The Chancellor was similarly unwilling to continue the hearing until such time as April could return with children from Maine to Mississippi. [T. 3]. Allowing a continuance would have been the appropriate course of action, particularly since Shane could not demonstrate any irreparable harm since he was living in Virginia at the time and thus already separated from the children. [T. 24]. Despite further attempts to alter the custody arrangements, April has been limited to only reasonable visitation with her children. [R.E. 0094; R. 350, 374]. April resumed work as an occupational therapist at King's Daughters Medical Center in March of 2006, before leaving again on October 19, 2006, and returning to her position again in March of 2007. [T. 714]. She is still employed with King's Daughters Medical Center in Brookhaven. Her job responsibilities require her to work closely with special needs children in the Brookhaven Public School District to provide inpatient therapy and evaluate and determine educational plans that will best suit their special learning needs. [T. 715].

The above recitation reveals the extent to which April–and not Shane–was at home with the children and was their primary caregiver in virtually every respect. While Shane tried to damage April's character with written deposition testimony from his friends in Italy, France and Croatia, the fact remains that April stayed with Shane's children everyday while they were in Italy and

Mississippi. There is nothing in the record to suggest that Shane ever attempted to place the children in someone else's care during their stays abroad or whenever April and the children returned to Mississippi. [T. 25-27]. Further, and for reasons stated in this brief, the Chancellor erroneously admitted the deposition on written questions despite the fact they were plagued by numerous procedural and credibility issues. The cumulative effect of the Chancellor's rulings consistently favoring Shane in prior proceedings and the pervasive err throughout the Chancellor's findings after the trial of this matter reveal the extent of the lower court's abuse of its discretion resulting in extreme prejudice to April.

SUMMARY OF THE ARGUMENT

The Chancellor was manifestly wrong, applied erroneous legal standards, based his findings on erroneous and incomplete facts and abused his discretion in awarding sole physical and legal custody to Shane. The Chancellor committed manifest error by allowing into evidence depositions on written questions and substantially relying on same to render his opinion to award physical and legal custody to Shane. The Chancellor erroneously allowed into evidence depositions on written questions which were not properly noticed pursuant to Miss. R. Civ. P. 30 and 31 and which were not properly certified pursuant to Miss. R. Civ. P. 30(f)(1). The February 21, 2007 notices were deficient pursuant to Mississippi Rule of Civil Procedure 31(a) in that they lacked "the name or descriptive title and address of the officer before whom the deposition is to be taken." The March 19, 2007 notices were cured of this deficiency but, by then, the witnesses had already been deposed according to the dates provided above. The *responses* to the deposition questions also had deficiencies. The responses to the depositions on written questions were not properly certified by the designated officials nor were notices attached to them, likely because Shane only filed the amended notices on March 19, 2007 and four of the five depositions had actually been taken prior to that date.

The Chancellor also abused his discretion by allowing into evidence depositions on written questions which contained questions that were highly objectionable as to form. The written deposition questions were improper in that they were leading and called for legal conclusions and elicited only testimony as to character evidence against April. The Chancellor furthered erred in heavily relying upon the testimony elicited from the responses to the written deposition questions to formulate his ruling awarding physical and legal custody of the girls to Shane.

Additionally, the Chancellor's acceptance and consideration of the guardian ad litem's report deprived the parties, especially April, of the opportunity to challenge the guardian ad litem's findings and recommendations. By accepting the final report of the guardian ad litem on the last day of trial, the lower court deprived April of the opportunity to challenge the guardian ad litem's findings and recommendations, which resulted in the Chancellor's award of full physical and legal custody to Shane and extreme prejudice to April. Accordingly, this Court should reverse the decision of the Chancellor on this basis. Further, April requests that this Court take judicial notice of the fact that no guidelines currently exist in Mississippi to impose deadlines or otherwise require guardians ad litem to submit their reports in a fashion that would afford parties an adequate opportunity for review and have the opportunity to call necessary witnesses.

The Chancellor also committed manifest error and abused his discretion in not fairly and equitably applying and analyzing the factors enumerated in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The conclusions reached by the Chancellor are not an accurate reflection of all of the facts, and the Chancellor placed too much weight on certain facts and disregarded others in awarding full custody to Shane. The lower court's *Albright* analysis failed to consider substantial, relevant and credible evidence necessary to a determination of the best interest of the children. The

Chancellor improperly and erroneously considered only evidence and testimony favoring Shane and failed to consider substantial, credible evidence which overwhelmingly favored April.

The trial court takes over ninety pages to justify not favoring April on a single factor and seizes every opportunity to portray the testimony in the light most favorable to Shane all the while completely ignoring evidence overwhelmingly favorable to April. The cumulative effect of the lack of substantial evidence in the lower court's ruling and the pervasive error throughout amounts to an abuse of discretion warranting reversal of the court's award of full physical and legal custody to Shane.

The learned Chancellor discussed fourteen (14) separate factors in his *Albright* analysis as well as several subfactors. In so doing, the Chancellor did not specifically find a single factor in favor of April. The cumulative effect of the error in the trial court's *Albright* analysis amounts to an abuse of discretion warranting reversal. Specifically, the Chancellor was manifestly wrong and/or clearly erroneous in his findings concerning the factors of age of the children, health and sex of the children, continuity of care prior to separation, parenting skills, willingness and capacity, employment responsibilities, moral fitness, and the two "other factors" considered by the lower court.

Alternatively, the court erred by failing to award the parties joint legal custody of the children.

Finally, the court also erred in requiring April to be responsible for all medical expenses not covered by insurance.

STANDARD OF REVIEW

The appellate courts "will not disturb the Chancellor's opinion when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Holloman v. Holloman*, 691 So. 2d 897, 898 (Miss. 1996). The appellate courts will not reverse "[u]nless the trial judge's discretion is so abused as to be prejudicial to a party." *Rushing v. Rushing*, 724 So. 2d 911, 914 (Miss. 1998)(quoting *Stewart v. Stewart*, 645 So. 2d 1319, 1320 (Miss. 1994)). The appellate court must determine whether the Chancellor's decision is supported by credible evidence in the record. *Funderburk v. Funderburk*, 909 So.2d 1241, 1243 (Miss. Ct. App. 2005). The polestar consideration in child custody cases is always the best interests of the children. *See Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001). Chancellors must apply the factors from *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983), in arriving at a custody arrangement that is in the best interest of the children. *Id.* The appellate court must "review[] the evidence and testimony presented at trial under each factor to ensure [the Chancellor's] ruling was supported by [the] record" to determine if there was an abuse of discretion by the Chancellor. *Id.* The "appellate court must find a Chancellor in error where the Chancellor improperly considers and applies the *Albright* factors." *Id.* Further, this Court has often stated that the Chancellor is in a better position to weigh the credibility of testimony because they are able to see and observe witnesses. *See, e.g., Gilliland v. Gilliland*, 969 So. 2d 56 (Miss. Ct. App. 2007). However, the Chancellor below was in no better position to weigh the credibility of the testimony provided by the witnesses who responded to written depositions; therefore, this Court's review of their testimony should be less deferential than in other cases. The learned Chancellor below applied the *Albright* factors, but he did not do so fairly, equitably or properly. His findings are not supported by substantial or credible evidence. 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. The pervasive nature of the Chancellor's error and the bias favoring Shane throughout the court's ruling make this an exceptional case worthy of reversal.

ARGUMENT

I. The Chancellor committed manifest error by allowing into evidence depositions on written questions and substantially relying on same to render his opinion to award physical and legal custody to Shane.

A. The Chancellor erroneously allowed into evidence depositions on written questions which were not properly noticed pursuant to Miss. R. Civ. P. 30 and 31 and which were not properly certified pursuant to Miss. R. Civ. P. 30(f)(1).

On August 6, 2007, April filed a Motion *in Limine* in which she moved the court to exclude deposition testimony from five witnesses who were deposed in Croatia, Italy and France in February and March of 2007. [R. 229]. These witnesses were deposed with depositions upon written questions, an acceptable, albeit, rare method of obtaining deposition testimony. *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 of a hostile or reluctant witness. Accordingly, [they are] used only occasionally."). Chief among the issues raised in the Motion *in Limine* was that the original deposition notices were deficient pursuant to the Mississippi Rules of Civil Procedure and that they were not amended and refiled until *after* the witnesses were actually deposed. The original notices were served on April on February 20, 2007 and filed with the court on February 21, 2007. The amended notices were not served on April until March 12, 2007 and filed with the court until March 19, 2007. Meanwhile, according to the responses to the depositions served on April on March 28,

2007, the witnesses were actually deposed on the following dates:

(a) William Bottarelli, February 27, 2007;
(b) Nikki Daley, March 16, 2007;
(c) Lorraine Fischer, March 16, 2007;
(d) Luigi Tonguhini, March 16, 2007;
(e) Boris Ruskovsky, March 19, 2007.

[R.E. 00111-001573]. At the court's hearing on the Motion *in Limine*, April's counsel argued that before the court that "given the date of the amended notice and filing date especially, the actual taking of the depositions by written questions or the purported responses to the written questions by the deponents were either on the same date or prior to the date of notice." [T. 405]. Accordingly, Mr. Boerner argued April was effectively denied the right to participate in the deposition process as it related to the deposition on written questions.

The February 21, 2007 notices were deficient pursuant to Mississippi Rule of Civil Procedure Rule 31(a) in that they lacked "the name or descriptive title and address of the officer before whom the deposition is to be taken." The March 19, 2007 notices were cured of this deficiency but again, by then, the witnesses had already been deposed according to the dates provided above.

The problems with the depositions on written questions did not stop with the deposition notices. The *responses* to the deposition questions also had deficiencies. Shane provided copies of the responses to the depositions on written questions to April on March 28, 2007. [T. 408]. Pursuant to Rule 31(f)(1),

> when a deposition is recorded by other than stenographic means . . . *the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording.*

(emphasis added). Rule 31(b) further provides in pertinent part that:

> a copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the

deposition, *attaching, thereto the copy of the notice and the questions received by him.*

(emphasis added).

The responses to the depositions on written questions were not properly certified by the designated officials nor were notices attached to them, likely because Shane only filed the amended notices on March 19, 2007 and four of the five depositions had actually been taken prior to that date. Thus, the depositions taken in this case were proceeded upon in contradiction to Mississippi Rules of Civil Procedure Rule 30 and 31.

According to Wright & Miller, a court "may make protective orders when a deposition is to be taken on written questions, and in particular may order that depositions may not be taken except upon oral examination. It may also authorize oral cross examination though the deposition is otherwise to be taken on written questions." *See* 10 Wright & Miller, *Federal Practice & Procedure* § 91, p. 63000; *see* also M.R.C.P. Rule 26(c)(3)(discussing limitations that can be placed on discovery). The Chancellor had considerable discretion with respect to the deposition on written questions and, by admitting them, he effectively prejudiced April. The fact alone that the February 21, 2007 notices failed to meet the notice requirements contemplated by the Mississippi Rules of Civil Procedure should have prompted the court to exercise its discretion in exclude the depositions on written questions from the trial.

Rather than addressing the procedural deficiencies and accordingly excluding the depositions on *those* grounds, the Chancellor instead denied April's Motion *in Limine* on the basis that Rule 31 does not contemplate the simultaneous submission of direct and cross-examination questions. By denying April's Motion on that basis, the Chancellor failed to consider the fact that each of the deponents responded to the written deposition questions *before* Shane actually served April or the

court with proper notices of the depositions. Further, the Chancellor's ruling shows that he failed to consider that the responses to the depositions were not certified or returned to Shane pursuant to Rule 31(b). Before providing for the rules with respect to cross, redirect and recross questions, Rule 31(a) *first* contemplates that depositions upon written questions be properly noticed. By failing to sufficiently acknowledge that deponents responded to the written questions well before Shane cured the deficiencies of the original notices, the Chancellor clearly ignored the threshold provisions of Rule 31. By failing to fully consider April's arguments with respect to the deficient manner in which the responses were returned by the deposition officials, the Chancellor clearly ignored the provisions of Rules 30 *and* 31. Accordingly, the Chancellor erred in denying April's Motion *in Limine* and allowing the admission of the written depositions into the trial on this matter.

The Mississippi Supreme Court in *Saunders v. Erwin*, 3 Miss. 732 (1838) upheld the trial court's rejection of a written deposition where the party applying for a commission to take a deposition upon written questions failed to provide the opposing party the questions or a notice. The court stated that:

> we find no evidence in this record, that the interrogatories which were to be propounded to the witness, were ever served on the opposite party as the statute requires; or that any notice was given him of the time at which the commission would issue to take their answers. These defects alone amply justify the court below in rejecting the depositions.

See Saunders, 3 Miss. at 733-34. In the case at bar, Shane failed to provide April with proper notice of the depositions or provide April with written deposition responses that accorded with the provisions of Miss. R. Civ. P. Rule 30 or 31. Pursuant to the Mississippi Rules of Civil Procedure and the holding in *Saunders*, the Chancellor should have excluded the depositions on written questions because of these procedural defects and accordingly granted April's Motion *in Limine* by excluding this testimony from the trial on this matter.

B. The Chancellor abused his discretion by allowing into evidence depositions on written questions which contained questions that were highly objectionable as to form.

In addition to their procedural defects, the depositions on written questions were replete with questions that fly in the face of the Mississippi Rules of Evidence. Since the witnesses were deposed before April could submit her objections, she could not object to the deposition questions before the witnesses were actually deposed. The objectionable nature of the written deposition questions make their credibility and reliability questionable. Further, since the Chancellor was unable to ascertain whether the witnesses themselves were credible, he should not have accorded such substantial weight to their testimony in Shane's favor, particularly since April had not cross-examined the witnesses with questions of her own. According to *Gilliland v. Gilliland*, 969 So. 2d 56 (Miss. Ct. App. 2007), "the Chancellor, by his presence in the courtroom, [is] best equipped to listen to witnesses, observe their demeanor, and determine the credibility of those witnesses and what weight ought to be ascribed to the evidence given by those witnesses." *See also Rogers v. Morin*, 791 So. 2d 815, 826 (Miss. 2001)(quoting *Carter v. Carter*, 735 So.2d 1109, 1114 (Miss. Ct. App.1999)). Such is not the case at bar. The Chancellor in the instant matter erroneously ascribed significant weight to the evidence given by these witnesses without ever testing the extent to which the evidence was even credible thereby abusing his discretion in this regard.

The Chancellor also abused his discretion by not finding the deposition testimony to be inadmissible character evidence under Mississippi Rules of Evidence Rule 405(b) which provides that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or a defense, proof may also be made of specific instances of his conduct." The depositions on written questions all provide specific instances of April's conduct and they invoke negative portrayal of April's behavior at isolated occasions when the family was living in Italy. The

custody of the parties' children was the issue for the court to decide. Instead, the deposition testimony forced into the forefront April's character–something the Chancellor focused on throughout his custody determination. April could not refute the testimony of these witnesses relating to specific instances of her conduct nor was her character an essential element of any charge, claim, or defense contemplated by Shane. The Chancellor should have excluded the deposition testimony on this basis as being contrary to the Mississippi Rules of Evidence.

Not only did the deposition testimony contain inadmissible character evidence, a majority of the deposition questions were leading. Mississippi Rule of Evidence 611 provides that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." Further, the comment to Miss. R. Evid. 611 provides that "[l]eading questions as a general rule should not be used on direct examination since they suggest the answers the attorney wants from his own witness. This gives an unfair advantage to the party who is presenting his case." For example, the following question is from the written deposition of Nikki Daley:

> From your personal knowledge, observations and perception did Shane leave the B.B. King concert to timely carry Lindsey and Caitlin home to feed, bath and put them to bed, while April stayed at the concert?

[R.E. 00124].

This exemplary written deposition question clearly suggests the answer Shane's counsel desired. Similar leading questions were asked of all the witnesses and each witness provided the anticipated responses that were erroneously allowed into evidence.

The deposition questions were not only leading but also required the witnesses to draw legal conclusions or offer unqualified expert opinions. Mississippi Rules of Evidence 701 provides that:

> [i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The comment to Miss. R. Evid. 701 provides that "the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702." The Fifth Circuit in *Molignaro v. Dutton*, 373 F.2d 729 (5th Cir. 1967) cautioned that written questions "must be carefully constructed to elicit specific facts, *not conclusory generalities*." (emphasis added). Citing *Molignaro*, the court in *David v. Hill*, U.S. Dist. LEXIS 29761 (S.D. Tex. 2005), stated that "written deposition questions should be drafted so as to seek specific facts as opposed to conclusory generalities. If plaintiff's written questions fail these guidelines, then the deposition transcript, in whole or in part, may be excluded from use at trial." (internal citation omitted). In the instant matter, each deponent was asked to provide his or her own conclusions and opinions as to certain *Albright* factors. For instance, the deponents were asked to give their opinions on Shane's emotional ties with his children, his moral fitness for parenting and his parenting skills - all *Albright* factors. Further, the deponents were each asked to respond to a question asking which parent, Shane or April, exhibited the best parenting skills. None of these deponents are permitted or qualified to offer legal opinions, which this line of questioning clearly elicited. Consequently, these questions and the responses should have been stricken from the record.

Not a legal opinion?

C. The Chancellor and Guardian ad litem erred in substantially relying on depositions upon written questions which should not have been allowed into evidence and which ultimately formed the basis of the lower court's award of full physical and legal custody to Shane.

The Chancellor erred in admitting into evidence the depositions upon written questions, and the Chancellor erred in heavily relying upon the testimony elicited from the responses to the depositions questions to formulate his ruling awarding physical and legal custody to Shane. In particular, the Chancellor relied on the written deposition responses in his analysis of several of the *Albright* factors, especially the factors related to the continuing care of the children before separation and the moral fitness of the parents.

In conducting his analysis of the continuing care of the child before separation, the Chancellor twice references the depositions on written questions. Of those references, the Chancellor's reference to the written deposition testimony of Boris Ruskovsky regarding Shane's alleged nightly care of the children while in Italy was particularly improper in that the Chancellor regards Shane's alleged care of the children on "three or four days" as sufficient basis for this finding in stating:

> Also, I cannot ignore the deposition on written questions testimony of Boris Ruskovsky on the VIP maiden voyage of the Carnival Liberty ship in 2005 where he said that for three of four days Shane took care of the children in the cabin every night.

[R.E. 0057, R. 309].

The Chancellor further saturated the discussion of this factor with references to April's alleged conduct while in Italy–information he primarily gleaned from the depositions on written questions even if not specifically cited–to ultimately determine that this factor favored Shane. Despite April's testimony to the contrary, the Chancellor weighed more heavily the testimony of witnesses who, by their own admission, interacted with April on several, isolated occasions during a very short period in the lives of Shane, April and their children. Again, the Chancellor was in no

position to presume that their testimony presented substantial, credible evidence and, as such, the testimony should have been excluded from the trial.

According to Wright & Miller, while depositions on written questions are convenient and inexpensive, they are "more cumbersome than an oral examination and less suitable for a complicated inquiry or for a searching interrogation of a hostile or reluctant witness. Accordingly, [they are] used only occasionally." *See* 8A Wright & Miller, *Federal Practice & Procedure* § 2131, p. 22158; see also *Alliance to End Repression v. Rochford*, 75 F.R.D. 428, 429 (D.C. Ill. 1976)("without a doubt, oral deposition is preferable to written interrogatories when dealing with a recalcitrant or hostile witness.") Inquiries into the factors that will ultimately assist a Chancellor in determining custody certainly fall within the realm of "complicated" inquiries, and as such, the Chancellor's substantial reliance on the depositions on written questions to assess April's capacity to render continuing care to her children prior to separation was entirely misplaced.

In addition to the factor regarding continuity of care, the Chancellor also heavily and improperly relied on the depositions on written questions to analyze the *Albright* factor related to the moral fitness of the parties. The Chancellor's *entire* discussion under this factor focused on testimony from the deposition on written questions regarding April's alleged conduct while in Italy. The Chancellor references the testimony from *all* of the deponents to make his determination that this factor favored Shane. The Chancellor merely dismisses any problems with the written depositions by stating that April "chose not to test their credibility by written cross-examination questions or other objections until three weeks before trial" [R.E.0071; R.323] rather than acknowledging that Shane failed to provide April with proper notice of the depositions thus preventing her from submitting objections and cross-examination questions.

The Chancellor addressed the deposition testimony of each witness, one by one, to substantiate his finding favoring Shane under the *Albright* factor for moral fitness. The Chancellor's analysis with respect to this *Albright* factor clearly rests on the testimony provided by the depositions on written questions and not on the other evidence or testimony raised at the trial on this matter. April denied the occurrence of the events described in the depositions in her interview with the guardian ad litem. [R.E.0097; Ex GAL-1-Summary of Interviews]. As stated in the foregoing sections, the situation is not as simple as the Chancellor suggested. April did not simply "choose" not to test the credibility of the deponents; rather, she was never given the opportunity to do so before the depositions were actually taken. In fact, the Chancellor was in no better a position to test their credibility than April. *See Gilliland*, 969 So.2d at 71. Further, April effectively objected to the admission of the depositions in her Motion *in Limine* on the basis that the depositions failed to satisfy the requirements of Mississippi Rules of Civil Procedure 30 and 31.

Since the Chancellor erroneously admitted the depositions on written questions, the guardian ad litem was able to consider this testimony when making her recommendation to the court. The Guardian ad litem addressed the written depositions in her written report and in her trial testimony. The relevant section of her report proceeded as follows:

> Another issue of concern is the written depositions of individuals regarding the mother's behavior while the family lived in Italy. The mother's only explanation is that these incidents never occurred. However, four individuals provided sworn testimony regarding the mother's behavior of excessive drinking and inappropriate behavior with men other than the father in public places while the father was caring for the children.

[R.E. 00108; Ex GAL-1-Findings and Recommendations].

The relevant sections of the guardian ad litem's trial testimony are as follows:

> Q: Well, based upon your investigation, what is your finding with regard to moral fitness of these parents? And, if you would address Mrs. McCullough first.

A: . . . I'm going to have to say that slightly favors the father, that being that we have the - - and I believe I've addressed in here, first of all, her decisions in going to Maine, *as well as the written depositions from Italy*.

Q: Do you give the same weight to the written depositions as you do to witnesses that appear here in person and testify?

A: I'm giving weight to that evidence because the court's ruling is that [it] is competent evidence in this trial . . . There are four individuals here that have sworn testimony of behavior of excessive drinking and inappropriate behavior with other men. That a sheer weight of four people saying these things happened, and the mother denies that, again, I think that does go toward weight.

[T. 1415 (emphasis added)].

The Chancellor endorsed the guardian ad litem's recommendation "slightly favoring" Shane in his ruling, stating:

> Although the guardian ad litem found this to be an extremely close case, I did not, and I find nothing that would cause me to reject her recommendations. There is nothing in this record that would substantiate specific findings that the guardian ad litem's recommendation is not in the best interest of the children.

[R.E. 0086; R. 337].

For the foregoing reasons, this Court should reverse the decision of the trial court inasmuch as the Chancellor and the Guardian ad litem largely based their findings as to the determination of child custody on the depositions on written questions – which were improper and should have never been admitted into evidence much less have been given such great weight by the lower court.

II. The Chancellor erroneously considered the Guardian ad litem's final report which was not submitted until the final day of trial thereby depriving April of an opportunity to challenge the Guardian ad litem's findings and recommendations.

The Guardian ad litem (GAL) did not submit her final report until the last day of the trial. Thus, April and her counsel did not have an adequate opportunity to review information related to the GAL's interviews, the documents she reviewed, or her findings and recommendations for custody in advance of her testimony at trial regarding the same. The GAL submitted a preliminary

report to the Court on September 27, 2007 that she did not supplement until the last day of trial. The GAL explained the late submission of the final report stating that she wanted an opportunity to hear all of the trial testimony before submitting her final report. Nevertheless, she testified that the final report was:

> limited to my investigation, not – it is 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)]. Since she alleges the final report did not include references to the trial testimony, it is not clear why the Guardian ad litem waited until the last day of trial to submit the final report. The submission of this last minute report substantially prejudiced April, and the Chancellor should have accordingly disregarded the final report of the GAL and not considered it in his custody determination.

The Chancellor provided the parties with a "brief recess" to review the final report reasoning that "I don't think it would be fair to have them [the parties] question you on the fly without having the opportunity to review the document that was just circulated." However, he failed to consider that such a limited recess would hardly afford the parties, especially April, an opportunity to effectively challenge the findings contained in the document. [T. 1404]. In *Gilliland v. Gilliland*, 969 So.2d 56 (Miss.App. 2007), this Court ruled against an Appellant who contended that she had not been given an opportunity to challenge a guardian ad litem report that had been submitted some *five* months before a custody hearing. The case at bar differs from *Gilliland* in that the instant final report was submitted on the last day of the custody hearing, rather than months before, and there is nothing to suggest that the Chancellor fully appreciated how this may have been prejudicial in the trial transcript or in his ruling.

In *Lee v. Lee*, 798 So.2d 1284 (Miss. 2001), the Mississippi Supreme Court ruled that both parties were harmed and prejudiced when a Chancellor accepted a Guardian ad litem's report without further hearing. The Court reasoned that:

> by accepting and considering the guardian ad litem's report without further hearing, the Chancellor essentially considered impermissible evidence, *as well as deprived the parents of an opportunity to introduce evidence of changed circumstances or challenges to the report's findings*. There can be little argument that the consideration of such material and the lack of a further hearing as ordained in the Chancellor's own order harmed and prejudiced the parties.

While the Chancellor in the instant case did not order a further custody hearing as in *Lee,* both Chancellors erroneously considered the evidence of a Guardian ad litem's report without allowing the parties an opportunity to challenge the information contained in the final report and/or develop examination questions of the guardian ad litem to address the same. While there are no guidelines to indicate when a guardian ad litem must submit her reports to the Court, a guardian ad litem should not be permitted to wait until the last day of trial to do so, particularly when she has failed to supplement a preliminary report with information that might provide some insight into what she will recommend to the Court. Here, in addition to her above-referenced reliance on the written deposition questions, the Guardian ad litem presented a final report that reflected an *Albright* analysis that, by all accounts, favored April and not Shane. However, the GAL nevertheless testified that she slightly favored Shane for physical custody of the children. She pontificates on the virtues of the school systems in Ocean Springs as compared to those in Brookhaven, gives improper weight to April's trip to Maine, and erroneously assumes as being true information obtained from April's former sister-in-law. [T. 1403-35]. The final report is replete with other inaccuracies and inconsistencies, largely because the guardian ad litem, like the Chancellor, fails to give appropriate weight to interviews and documents that tend to favor April or in any way disparage Shane.

The Chancellor's acceptance and consideration of the guardian ad litem's report deprived the parties of the opportunity to challenge the guardian ad litem's findings and recommendations. By accepting the final report on the last day of trial deprived April the opportunity to challenge the guardian ad litem's findings and recommendations, which resulted in the Chancellor's award of full physical and legal custody to Shane and extreme prejudice to April. Accordingly, this Court should reverse the decision of the Chancellor on this basis. Further, April suggests this Court take judicial notice of the fact that no guidelines currently exist in Mississippi to impose deadlines or otherwise require guardians ad litem to submit their reports in a fashion that would afford parties an adequate opportunity for review and have the opportunity to call necessary witnesses.

III. The Chancellor erred in his application of the *Albright* factors and abused his discretion in awarding sole physical and legal custody to Shane.

The trial court erred in granting sole physical and legal custody to Shane. The Chancellor committed manifest error and abused his discretion in not fairly and equitably applying and analyzing the factors enumerated in *Albright v. Albright*. The conclusions reached by the Chancellor are not an accurate reflection of all of the facts, and the Chancellor placed too much weight on certain facts and disregarded others in awarding full custody to Shane. The lower court's *Albright* analysis failed to consider substantial, relevant and credible evidence necessary to a determination of the best interest of the children. The Chancellor improperly and erroneously considered only evidence and testimony favoring Shane and failed to consider substantial, credible evidence which overwhelmingly favors April. Shane received only favorable consideration from the Chancellor whereas April received no favorable consideration whatsoever. The Chancellor places too much emphasis on highly skeptical and improperly-noticed written deposition testimony of foreign deponents who April never had an opportunity to confront. The Chancellor also places too much

emphasis and weight on the role and interests of the paternal grandparents as well as too much emphasis and weight on post-separation care of the children by Shane to the exclusion of the care provided almost exclusively by April during the course of the marriage. A review of the record reveals that April and Shane did not begin on equal footing in the court's application of the *Albright* analysis. The trial court takes over ninety pages to justify not favoring April on a single factor and seizes every opportunity to portray the testimony in the light most favorable to Shane all the while completely ignoring evidence overwhelmingly favorable to April. The cumulative effect of the lack of substantial evidence and the lower court's pervasive error amounts to an abuse of discretion warranting reversal of the court's award of full physical and legal custody to Shane. April should be awarded full physical custody of the parties' minor children.

The learned Chancellor discussed fourteen (14) separate factors in his *Albright* analysis as well as several subfactors. In so doing, the Chancellor did not specifically find a single factor in favor of April. The Chancellor either specifically favored Shane, found that neither party was favored, did not specifically favor a party or found the factor to be inapplicable. The cumulative effect of the trial court's *Albright* analysis amounts to an abuse of discretion warranting reversal. Specifically, the Chancellor was manifestly wrong and/or clearly erroneous in his findings concerning these factors:

Age

The court erred by not finding the age factor to favor April and by finding that the five (5) and three (3) year old girls were no longer of tender years. The lower court correctly noted that the girls were five (5) and three (3) years of age and "arguably of tender years." However, the Chancellor ultimately determined that the children were not of tender years because they could be "equally cared for by persons other than the mother." [R.E. 0054; R. 306]. The Chancellor stated

that Shane had demonstrated his ability to provide care for children of this age "throughout the marriage," yet he can only cite a few specific instances where Shane ever had the responsibility to care for his own daughters. The evidence referenced by the lower court in this regard is neither substantial nor credible. The court in *Albright* noted that the "tender years" doctrine had undergone a weakening process, but specifically stated that "[t]o abandon the rule . . . would discard a factor worthy of weight in determining the best interest of a child." *Albright*, 437 So. 2d at 1005. "[T]here is still a presumption that a mother is generally better suited to raise a young child." *Passmore v. Passmore*, 827 So.2d 747, 750-51 (Miss. Ct. App. 2002). April, however, received no benefit at all from this worthy, albeit weakened, doctrine. The Chancellor only attempted to show that the girls could equally be cared for by Shane. The Chancellor states more than once in his ruling that on a single occasion Shane stayed with the three-month-old Caitlyn while she was being cared for at the hospital in Italy. The Chancellor never mentions or acknowledges, however, that while Shane was staying at the hospital, April was at home taking care of their two-year-old daughter Lindsey. This should hardly favor Shane or be indicative of some equal ability to care for the girls. Also, the lower court relies on the flawed written deposition testimony, for the first time among many in his ruling, which references at most a few instances where Shane watched after the girls at night when April went out for a "girls night out" while the family lived in Italy. [R.E. 00111 et seq.]. The Chancellor heavily weighs these few occasions where Shane ever had the responsibility to watch after his own children and fails to acknowledge the days, weeks, months and years April cared for all the needs of the children. Lastly, the court noted that the girls had been under the care of Shane since the Chancellor granted him temporary custody. The few instances cited by the lower court when Shane had to be the caretaker of the girls does not show that Shane has or could equally care for the five (5) and three (3) year old girls. Mississippi appellate courts have often found that a child of five (5)

years, and especially three (3) years, are deemed to be of "tender years." This factor, especially when considered with the sex of the children, should have favored April. *See Mosley v. Mosley*, 784 So. 2d 901, 906 (Miss. 2001) (five- year-old child considered a "child of tender years"); *Taylor v. Taylor*, 909 So.2d 1280, 1281 (Miss. Ct. App. 2005) (age of three-year-old boy favored mother); *Beasley v. Scott*, 900 So.2d 1217, 1220 (Miss. Ct. App. 2005) (age of four-year-old girl favored mother).

Health and Sex

The trial court correctly noted that the health of the girls does not favor either party. However, the trial court erroneously found that the sex of the girls favored neither parent. The children are young girls, and this factor, though not alone dispositive, should nonetheless favor April. The Chancellor cites case law where the sex of the children weighed in favor of the same sex parent. The Chancellor found these cases inapplicable because the girls were not older. The sex of these girls is a factor that should have obviously favored April, however. *See, e.g., Parker v. South*, 1913 So.2d 339, 348 (Miss. Ct. App. 2005) (age and sex of nine-year-old boy favored father). Also, the appellate courts have stated that the sex of the children in determining custody is more important than age. *See Steverson v. Steverson*, 846 So.2d 304, 306 (Miss. Ct. App. 2003). Common sense dictates that the age and sex of three- and five-year old girls should favor the mother. Though these facts alone may not be determinative of custody, the trial court nonetheless erred in failing to acknowledge that these factors favor April.

Continuity of Care

The trial court erred in not finding the continuity of care factor to fully favor April. The overwhelming weight of the evidence clearly suggests that April had continuing care of these girls prior to separation and was in almost every respect the primary care giver to the girls. The court,

however, barely makes mention of this substantial fact supported by the evidence. Rather, the Chancellor discusses for over five (5) pages every occasion in evidence in which Shane may have ever provided any care for the girls. The court gave only slight mention of the years of continuing care and often sole care of the girls provided by April. The Chancellor inexplicably placed excessive weight on single instances of Shane's care which should not outweigh April's proven continuing care of the girls. *See Watts v. Watts*, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). The court's failure to fairly and adequately assess the credible evidence as it pertained to the continuity of care factor is an abuse of discretion by the trial court. The court, as it did throughout the entirety of its ruling, continuously highlighted all evidence that could have been construed favorably for Shane and failed to mention or properly weigh evidence favoring April. The lower court was even hesitant to state that this factor even *slightly* favored April despite the overwhelming weight of the credible evidence. The Chancellor stated 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 (emphasis added)].

Specifically, the Court erred in finding that Shane "bathed the children nearly exclusively" and that Shane "cooked and fed about fifty percent (50%) of the time, as did April." [R.E. 0057; R.309] Further, the Court erred in finding that neither party put the children to bed more than the other and that Shane was "the primary disciplinarian." [R.E. 0058; R. 310]. Additionally, the trial court erred in placing so much emphasis on the care of the children that occurred after its award of temporary physical custody to Shane. The court erred in giving so much weight to the post-temporary custody period and failing to acknowledge April's primary and continuing care of the children up to the point at which the court initially gave temporary physical custody to Shane. Furthermore, the Chancellor ignores evidence that suggests that during much of the weekend time

that Shane had the girls they were primarily with and under the care of the paternal grandparents, Pat and Peggy McCullough. [T. 219-20, 922, 963-64]. Additionally, the lower court once again relied on the flawed written deposition testimony to support its findings, and this testimony only concerned specific instances during the short period of time they lived in Italy.

A fit mother that has been a child's permanent caretaker is likely to be awarded custody based in part on that factor. *See* Deborah H. Bell, Bell on Mississippi Family Law 104 (2005). The Mississippi Supreme Court has stated that where all factors are equal, custody should have been awarded to the mother as primary caretaker. *Moak v. Moak*, 631 So.2d. 196, 198 (Miss. 1994). The continuity of care factor has also been the determinative factor even where other factors did not favor the party with continuing care. *See Brock v. Brock*, 906 So.2d 879, 886 (Miss. Ct. App. 2005) (custody awarded to mother who provided more child care during the marriage despite her adultery); *Beasley v. Scott*, 900 So.2d 1217, 1220 (Miss. Ct. App. 2005) (continuity of care factor favored mother who had sole care of child the first two and one-half years of child's life despite her cohabitation, a DUI, her use of alcohol and marijuana outside the presence of the child and her unstable employment). This crucial factor should have favored April and not only slightly so but overwhelmingly so.

Also, the seminal *Albright* decision directs Chancellors to make a determination as to which parent provided continuity of care *prior to separation*. *Albright*, 437 So.2d at 1005.; *see also Messer v. Messer*, 850 So.2d 161, 166 (Miss. Ct. App. 2003) (the factor favored father who provided 75% of care prior to separation). The Mississippi Court of Appeals has held that a lower court erred in holding that the continuity of care factor favored a father who is the primary caregiver at the time of separation as opposed to a mother who had been the primary caregiver most of the time. *Lawrence v. Lawrence*, 956 So.2d 251, 258-59 (Miss. Ct. App. 2006). Instead of acknowledging

that April had long been the primary caregiver to the girls and undisputedly had the continuing care of the girls for the majority of their lives, the Chancellor rules as though the credible evidence suggested they were dual caregivers. The substantial evidence most certainly does not show that they were dual caregivers and, therefore, the court's analysis over who bathed the children more, who cooked and fed for the children more, who dressed the children more, and who disciplined the children more was not even necessary. The Chancellor begins his discussion by pointing to Shane's "daddy time" routine while they lived in Italy during which time he bathed the children before they went to bed when he was home. [R.E. 0056; R. 308]. The court does not point out what the evidence suggests that this opportunity was both facilitated and encouraged by April who cared for the girls all day every day so as to give Shane an opportunity to spend some quality time with the girls. Also, only accounting for the time spent in Italy, the court finds that the parties cooked for the children equally. The error with the Chancellor's findings are at least two-fold. First, the court only considers time spent in Italy. The lower court barely, if at all, mentions periods of time when the children were largely in the sole care of their mother while living in Mississippi or the time in Italy when April would have largely been the exclusive caregiver. Second, there is no evidence to suggest that Shane bathed the children nearly exclusively. The very language used by the Court suggests that there is no indication that April ever bathed the children. This is certainly not based on any evidence in the record.

As with almost every other factor considered by the court, the court based its opinions in part on the testimony contained in one or more of the written depositions by foreign deponents. Additionally, even assuming there were not inherent problems with the written deposition testimony, the written deposition testimony of Boris Ruskovsky cited by the Chancellor only involved a handful of days of care at best. [R.E. 00151]. It is incredible to suggest that a few days of care by Shane

can be weighed comparably to the care provided by April. Also, the Chancellor made much ado about some weekend days where April may have slept late as if she is not entitled to do so and as if this somehow reflects negatively upon her and supports a conclusion that Shane was the primary caregiver. Even when the Chancellor acknowledged that April dressed the children more often, he slights her in favor of Shane by stating, "Obviously April dressed the children more times as she stayed home as a housemother, but Shane did when he was home and helped prepare for bedtime under his routine." [R.E.0057; R. 309]. As to which parent took the children to the doctor more often, the Chancellor has to acknowledges that "April prior to the separation took the children primarily to the doctor or certainly more often." [R.E. 0058; R. 310]. The Chancellor follows this acknowledgment, however, by again citing the Italy hospital incident as favorable to Shane. The Chancellor again failed to acknowledge that April necessarily had to be at home caring for their two-and-a-half-year old child while Shane stayed with the baby in the hospital This hardly proves anything but certainly does not prove any heightened level of care offered by Shane or support a finding of continuing care by Shane. The weight the Chancellor places on this single occurrence does not equate to credible, substantial evidence that Shane was the primary caregiver or had continuing care of the girls. The Chancellor also noted that Shane had made medical arrangements for the girls since he was given sole temporary custody by the lower court. Equity dictates that this should not weigh against April or in favor Shane. There is no evidence that April did not or would not make medical arrangements for the girls during this time period had she even had the opportunity to do during her every-other-weekend visitation.

The court considers discipline under the continuity of care factor and finds that both parents have disciplined the children but "believes that Shane was the primary disciplinarian." [R.E.0058; R. 310]. Yet, the Chancellor offers nothing to support why he believes Shane was the primary

disciplinarian yet his discussion of discipline in a later factor shows that he personally preferred Shane's discipline of corporal punishment over April's "time out." The Chancellor is in effect punishing April for her method of discipline over that of Shane because he personally prefers Shane's discipline method, yet there is nothing in evidence to suggest that April was not an effective disciplinarian. The court concludes that "it is clear that Shane has demonstrated that he has the ability to provide permanent care for these young girls." [R.E.0060; R. 312]. The Chancellor, however, is applying an erroneous legal standard because this factor under *Albright* is not whether a parent has the *ability* to provide primary care but rather which parent had the continuity of care. The Chancellor attempts to support its conclusion by stating that April reported Shane to DHS on two different occasions and no action whatsoever was taken by DHS. This is an erroneous factual statement and erroneous logic. April did not report Shane to DHS on two different occasions but rather Shane was reported to DHS by the hospital and/or emergency room physician who treated Lindsey when she was taken to the emergency room for vaginal bleeding. Furthermore, the fact that DHS took no action against Shane does not even necessarily demonstrate he has the ability to provide primary care to the girls. Nevertheless, this is not the proper standard under this factor. Just because Shane may have the ability to provide primary care for the girls does not mean that he was ever the primary caregiver to the girls or had continuity of care prior to separation.

The Chancellor notes that there were occasions during which April had the children that she needed and received some help from Pat and Peggy McCullough, the paternal grandparents of the children. However, the Chancellor ignored that the same was even more true for Shane. The evidence suggests that during the weekends that Shane had the children, they were predominantly with Pat and Peggy McCullough. [T. 219-20, 922, 963-64]. The guardian ad litem even mentions in her report that it is a concern that when Shane has the children they are with their grandparents.

[R.E. 00109; GAL-Ex.-1- Findings and Recommendations, p. 4]. Even still, the court ignored this evidence and noted that when Shane returned from Italy in March 2006, he provided primary care on the weekends he had the children until October 20, 2006. The evidence indicates that Pat and Peggy McCullough provided primary care for the children during Shane's weekends. The evidence also establishes that during this time period Shane was working in Charlottesville, Virginia during this entire time and would only return home every three weeks, yet the court fails to take this into account in asserting that Shane exercised some primary caretaker status during these weekends. Despite the trial court's attempt to portray Shane as having continuing care during this period, it hardly rises to the level of primary caregiver and certainly does not equal the primary care provided by April.

The lower court erroneously gives substantial weight to the period of time after separation during which Shane had custody of the girls after having been awarded custody by the Court, a period of time of approximately five (5) months during which time April also exercised visitation every other weekend. If the post-separation care should be considered by the lower court at all, the absolute most it should indicate is that this factor as it pertains to this period should be weighed equally in favor of the parties. Therefore, the lower court's attention should have been on the care provided to the children during the marriage which undisputedly evidences that April was most often the primary caregiver of the children. The Chancellor erred because the continuity of care factor should have favored April and should not have favored her only slightly.

Parenting Skills

The Chancellor discussed the factor of parenting skills by focusing on the four (4) sub-factors of physical care, emotional support, discipline and guidance. The Chancellor weighed this factor in favor of Shane and completely ignored and/or discredited testimony favoring April's parenting

skills and focused on unsubstantiated and non-credible allegations and testimony. *See Watts*, 854 So. 2d at 13.[1] As to physical care, the Chancellor acknowledged that both parents have the ability and wherewithal to meet the requirement but questioned April's concern for the medical care of the girls. The Chancellor again acknowledged nothing favorable about April and only discussed things favorably about Shane in this regard. The Chancellor misconstrues the evidence and in so doing portrays it more negatively toward April than the facts reveal. The Chancellor noted that the youngest daughter has a tendency for allergies and faults April for having cats in her house. However, there is not testimony or evidence to suggest that Caitlin's allergies are in any way related to cats or worsened by cats. Also, there is no testimony or evidence to suggest that Caitlin was bothered by the cats or did not enjoy the responsibility or companionship that comes with caring for a pet. Furthermore, the court fails to take into account the fact that the girls are exposed to many more animals while at the home of Pat and Peggy McCullough, where the court often states and the evidence suggests the girls have spent substantial time especially while in the care of Shane. Lastly, the Chancellor mentions the misplaced and irrelevant accusation by Shane that April returns the children to him with cat hair on their clothes knowing that he has a severe allergy to cats. Though this is a deliberate attempt to portray April in a negative light, this has nothing to do with her ability to provide for the physical and medical care of her girls and no evidence to suggest this is done wilfully or spitefully. This is nothing more than speculation and conjecture. Also, in an attempt to apparently suggest that April did not provide adequate medical care to her girls, the court references a July 30, 2007 incident where April returned the girls to Shane, and Shane later took Lindsey to the doctor where she was diagnosed with strep throat like symptoms. The court expressly found it odd

[1] See specifically the Direct Examination of Christi Mills regarding the parenting skills and ability of April with the girls. [T. 718-25]

that April would not have noticed that Lindsey had a fever or red bumps even if it manifested itself during the drive from Brookhaven to Hattiesburg. April, however, testified that she was not aware that Lindsey exhibited any of these symptoms and that had she known she would have certainly taken her to the doctor. Also, the court failed to consider the testimony of Caroline Easterling, the very person who kept the girls all day before they were taken to meet Shane in Hattiesburg. Caroline Easterling's undisputed testimony was that she did not notice that Lindsey was exhibiting symptoms of an illness. [T.1377-78]. In contrast to the Chancellor's concern about April's attention to medical care for the girls, however, the Chancellor does not reference the time where Lindsey exhibited vaginal bleeding when she was returned to April by Shane, and April promptly took her to the emergency room. The Chancellor does not question or raise any concerns as to why Shane did not see it necessary to promptly take Lindsey to the doctor or the emergency room for something as serious as vaginal bleeding in a five-year-old girl. The trial court also points out that Shane maintained a log or history of the children's medical occurrences and medications and notes his testimony that a parent needs to have this information available at all times. The court fails to acknowledge that this log was only created by Shane once he was awarded sole custody and likely in anticipation of litigation. Further, the Chancellor should have questioned Shane's testimony that a parent needs to have this information available at all times considering he obviously did not believe such a log or history was necessary during the parties' marriage and prior to him being awarded sole custody.

Another occasion which the lower court cites to support its finding is also not appropriately considered and discussed. The Chancellor faults April for being concerned about what she perceived to be weight loss, poor skin tone and possible anemia-like symptoms of the girls yet does not take them to the doctor immediately. At this time, the girls were in the sole physical custody of Shane

with April having weekend visitation. April did in fact notify Shane of her concerns so that he could take the girls to the doctor. Under this factor and throughout the court's ruling, the Chancellor does not hold April and Shane to the same standards.

The trial court also discusses emotional support under this factor. The Chancellor finds that Shane is more emotionally supportive of the children yet only discusses emotional support as it relates to the exchange of the girls during the separation. The Chancellor yet again fails to acknowledge how April provided emotional support to the girls in any way and in all of the other aspects of their lives. The Chancellor also considers discipline under this factor and insists that he is not ruling on the differing discipline methods utilized by Shane and April. The Chancellor stated that he found Shane had a "definitive purpose and philosophy in administering discipline to his children"; whereas, April "just told me how she does it." [R.E. 0065-0066; R. 317-18]. The court abuses its discretion because there is not evidence to suggest that April's form of discipline of the girls is not effective or that Shane's form of discipline is somehow more effective. Rather, the Chancellor merely favors Shane because he tends to agree more with Shane's discipline philosophy and/or because Shane can better articulate his discipline philosophy than April. The Chancellor should have found that this subfactor favors neither parent as the evidence suggests they both discipline their children and presumably do so effectively.

The last subfactor considered by the trial court was guidance. The Chancellor only discusses guidance as it pertains to the "spiritual training of the girls." [R.E. 0066; R. 318]. The Chancellor acknowledged that both the girls seem to be involved in church yet failed to acknowledge that the only available evidence shows that only April, not Shane, accompanied the girls to church. The evidence suggests that April accompanied the children to church on the weekends she had the children. *See* Cross-Examination of Elaine Brewer [T. 525]. There is no evidence to suggest that

Shane ever accompanied the girls to church or took them to church. This relevant and credible evidence, which undeniably favors April, was never considered by the Chancellor. *See Davidson v. Coit*, 899 So. 2d 904, 911 (Miss. Ct. App. 2005) (holding Chancellor properly favored parent who evidence showed took children to church); *Dearman v. Dearman*, 811 So. 2d 308, 311 (Miss. Ct. App. 2001); *Pacheco v. Pacheco*, 770 So. 2d 1007, 1010-11 (Miss. Ct. App. 2000). The court found that this subfactor did not favor one parent over the other despite the credible evidence that this factor should in fact favor April. The Chancellor also ultimately found that Shane's parental skills were better than April's and that this factor favored Shane over April. The trial court abused its discretion in not considering relevant, credible evidence that favored April under this factor and in ultimately finding that the parenting skills factor favored Shane.

Willingness and Capacity

The trial court erred and was manifestly wrong in finding that the willingness and capacity factor favored Shane. This factor should have favored April. The court stated that both parents have the willingness and capacity to provide child care and child custody yet ultimately favors Shane again. The court is correct that both parents exhibited the willingness, yet it seriously errs in its analysis regarding capacity. What is most significant is what the court failed to consider. The undisputed, credible evidence clearly showed that April was attempting to purchase the house she was leasing which had a fenced-in yard, a separate bedroom for each of the girls, and was located in Brookhaven, Lincoln County, Mississippi. *See* Direct Examination of Elaine Brewer [T. 523], Christi Mills [T.718-19] and April McCullough. [T. 452-54]. Shane, however, was living in a two bedroom apartment which he rented in an apartment complex in Ocean Springs, Mississippi about which April expressed many concerns. *See* Direct Examination of April McCullough [T. 463-67]. All of this is substantiated in the GAL Report. [R.E. 107; GAL-Ex.1-Findings and

Recommendations, p. 2]. It is without question that the living conditions at April's home are superior to that of Shane. Lincoln County is the only stable home the girls had ever known. The Chancellor places much emphasis (in fact, too much emphasis) on the importance of the paternal grandparents in the children's lives yet fails to consider their proximity in Lincoln County under this factor. The court erred in not considering this evidence. *See Marter v. Marter*, 914 So. 2d 743, 750 (Miss. Ct. App. 2005).

What the trial court does consider under this factor to favor Shane is riddled with error. The court finds that Shane has a better support network outside of daycare because he has a dependent sitter service available and family willing to assist. The testimony does not specifically support that Shane has a sitter service available much less a dependable one and does not show that Shane had ever used the sitter service. Additionally, Shane's family does not live in Ocean Springs but rather in Lincoln County where April resides. This should hardly favor Shane. Furthermore, the court again ignores evidence and testimony favorable to April and refuses to weigh the evidence in the same light as it does with Shane. The court misconstrues the testimony of Caroline Easterling and Elaine Brewer stating they never testified they were willing to provide backup childcare for April. Caroline Easterling testified she in fact had provided backup childcare for April when needed. [T. 1375-78 (emphasis added)]. Though the witnesses may not have specifically been asked whether they were willing to provide childcare for April in the future, they certainly did not ever testify they would not and testified as witnesses on behalf of April. Shane had no one living in or near Ocean Springs testify that they in fact had provided backup childcare for him yet the court inexplicably favors Shane. Lastly, the court notes that both parents have the capacity to provide for the educational needs of the children but that Shane made the effort to "methodically compare[] the school districts and school systems to determine the best educational opportunities for the children."

[R.E. 0068; R. 320]. The court's finding again unjustifiably and inexplicably gives great deference to Shane in favoring him in this regard. What the court fails to recognize is that Shane had many more school systems and school districts to consider having recently moved to the Mississippi Coast than April did in Lincoln County. The Chancellor's failure to consider any evidence favorable to April regarding her capacity to have custody of the children and the Chancellor's failure to consider those facts negatively implicating Shane in this regard constitute an abuse of discretion warranting reversal of the trial court's custody determination.

Employment Responsibilities of the Parents

The court erroneously finds that this factor favors neither parent and states that there is nothing that makes one job overwhelmingly better than the other. As it pertains to the best interests of the children, however, April's job responsibilities and her ability in performing her job undisputedly favors her under this factor. Again, however, the court fails to recognize the favorable aspects of April's job and the credible testimony which is favorable to her in this regard. April works as an occupational therapist and specifically works with children with special needs. In fact, April's job requires her to work in the very schools the girls would attend if they attended school in Brookhaven. This is supported by the testimony of April's supervisor, Christi Mills, who testified about April's specific ability and capacity to work with and care for the children she treats. [T. 715, 722-23]. The Chancellor abused his discretion in failing to consider evidence which tilts this factor in favor of April.

Moral Fitness

The court relied almost exclusively in its discussion of moral fitness on the written deposition testimony of the foreign deponents, which as heretofore discussed, should not have been relied upon by the court much less have been allowed to be of such paramount importance to the court in

determining custody. The Chancellor simply dismisses the problems inherent in the written deposition testimony. The fact is that April refuted all of the testimony offered by the foreign witnesses in their written depositions. The fact is that none of the alleged behavior described in these written depositions was behavior that even allegedly took place in front of the children or had any adverse effects or consequences on the children. *See Cheek v. Ricker*, 431 So. 2d 1139, 1144-45 (Miss. 1983) (holding that where no detrimental effect on the welfare of the children is shown "a mother will not be denied custody for every act of indiscretion or immorality"). The fact is that the allegations contained in the written depositions were only a few single instances that took place while the parties and children lived in Italy. Shane did not and could not offer any evidence or testimony of similar conduct or behavior by April by anyone from the United States, much less Mississippi, or anyone with whom April had the opportunity to confront regarding these damning allegations. Furthermore, Shane did not and could not offer any evidence or testimony of similar conduct or behavior by April at any other point in time during the lives of the children or during the marriage of the parties. There was no evidence presented or pattern established that April had any history or tendency to abuse alcohol. These written depositions should not have been considered by the trial court and should not have been afforded such weight by the court especially considering the prejudicial and defamatory nature of the contents of these written depositions and the fact that no cross examination ever took place. The only corroborating evidence offered to support the testimony of these "phantom" witnesses was a photograph depicting April with one of the witnesses. Nothing about the photograph corroborates any of the alleged "morally unfit" behavior or anything other than April's presence in the photograph. The court places excessive weight on the written deposition testimony and effectively punishes April by awarding full physical and legal custody of the girls to Shane and by failing to fairly and equitably make an analysis under *Albright*. Even assuming the

allegations in the written depositions are true, which April denounced, and assuming the allegations are worthy to be given any weight or consideration, the Mississippi Supreme Court has stated that "it is unacceptable for Chancellors to use custody decisions as a way to punish a parent for her indiscretions." *Weeks v. Weeks*, No. 2006-CA-01265-COA ¶ 9 (Miss. Ct. App. Apr. 29, 2008)(citing *Lackey v. Fuller*, 755 So. 2d 1083, 1087 (Miss. 2000)).

The court never considers or questions the moral fitness of Shane. In fact, the court would not consider evidence regarding Shane McCullough's two DUI arrests from 1999 and 2001 stating that no predicate or pattern had been established that he had an abusive alcohol tendency and thus they were too remote. [T.1348]. Conversely, though no pattern or predicate was ever established that April had an abusive alcohol tendency, evidence by way of written deposition testimony from foreign deponents was allowed in by the trial court regarding instances of her consuming alcohol and allegedly getting inebriated while in Italy. The trial court did not consider this evidence too remote or too prejudicial. Further, the court later made mention of the fact that April had been married three times as somehow negatively affecting the stability of her home environment for the children. April's previous marriages were further remote in time than Shane's DUIs and are much less relevant to a custody determination. Furthermore, Shane's alleged concern about April's moral fitness as related to the alleged behavior testified to in the written depositions is disingenuous at best considering no change was made to April's stay-at-home mother status after the alleged instances discussed in the written depositions.

The court's long discussion of "other factors," one of which the court describes as April's "inaccuracies, inconsistencies, misrepresentations, or bad judgment" is also essentially the Chancellor's condemnation of April's moral fitness. [R.E. 0074; R. 326]. As will be discussed further, however, the court does not accurately and fully discuss all of the facts and does not fairly

weigh the evidence. The Chancellor was manifestly wrong in favoring Shane over April as to moral fitness and abused his discretion in so doing.

Stability of the Home Environment

The court found that both home environments were stable but he nonetheless noted that this was April's third marriage. [R.E. 0073; R. 325]. He does not state, however, how this in any way relates to the stability of the home environment. April has no other children from her previous marriages and there is nothing about this fact that in any way alters the stability of the home environment for these girls. The Chancellor's statement was in error and indicative of the pervasive favor of Shane found throughout the Chancellor's ruling. Also, what is equally erroneous about the court's finding as to the stability of the home environment is the crucial evidence regarding this factor which favored April and which the court ignored. Of the two parties, April is the parent who lives in Lincoln County, the only "home" the girls have ever known. The girls had to move to Ocean Springs, Mississippi to live with Shane in a rented apartment. Much of the girls' extended family, albeit Shane's family, as well as numerous friends and prior caretakers live in Lincoln County. It is undisputed that April's home in Brookhaven would be more stable as it is certainly more unstable to have uprooted the girls and have them live in a different town three hours away than to live where they had always lived and where they have relatives and friends nearby. *See Owens v. Owens*, 950 So. 2d 202, 211 (Miss. Ct. App. 2006); *Copeland v. Copeland*, 2004 WL 2903690 (Miss. Dec. 16, 2004); *Neville v. Neville*, 734 So. 2d 352, 356 (Miss. Ct. App. 1999). The Chancellor abused his discretion in ignoring this crucial evidence and erroneously considering April's previous marriages. This factor should favor April.

Other Factors

The court considers two "other factors" on which he heavily relies in making his determination as to favor Shane for custody. The first "other factor" is the presence of an extended family. [R.E. 0073-0074; R. 325-26]. In this case, the court is referring to the presence of the paternal grandparents, Pat and Peggy McCullough. The court abuses its discretion in weighing the rights of the paternal grandparents in this case so heavily and so often over those of April, the mother of the children. Throughout the court's ruling, he refers to Pat and Peggy McCullough and places too much emphasis on them in determining custody. All the while, however, the court never acknowledges the excessive amount of time the girls spend with the paternal grandparents when they are supposedly within the care of Shane and never considers this negatively in any way toward Shane. The court also finds that it is poor parental judgment on April's part for allegedly demonstrating that she would not "extend time with the extended family unless it is Shane's time and will not volunteer additional times." [R.E. 0073-0074; R. 325-26]. The court mentions this again in its ruling when it questions April's parental judgment regarding not allowing Pat and Peggy McCullough visitation time with the children except during Shane's time. There is no evidence in the record that April did not or would not allow Pat and Peggy McCullough time to see the girls except during Shane's time with the girls. In fact, the evidence available suggests just the opposite. April did allow Pat and Peggy McCullough additional visitation time during the separation. [T. 922, 963-64]. Also, April testified repeatedly that she would not prevent Pat and Peggy McCullough from seeing the children but that she had access to daycare and other people who could keep the girls if needed. [T. 392-94, 540-49]. Further, it is manifestly unfair and wrong for the Chancellor to expect April to agree to additional visitation with Pat and Peggy McCullough when Shane has full custody

and April only has visitation with the girls every other weekend. It is an abuse of discretion and manifestly wrong for the Chancellor to require such of April and place so much weight on the rights of the paternal grandparents in this matter.

Equally egregious is the Chancellor's finding that it was poor parental judgment for April to want her three- and five- year-old daughters to attend an educational-based day care program rather than be kept at home by the paternal grandparents. [R.E. 0080; R. 332]. It is an unfathomable abuse of discretion and utterly confusing to comprehend how the Chancellor can effectively punish April for wanting her young daughters to be in a day care environment emphasizing educational skills as opposed to being kept at the home of their paternal grandparents. The Chancellor most certainly overstepped his bounds and abused his discretion in discussing this issue much less finding this to be an issue negatively impacting April in the custody analysis. It is certainly in the best interest of the children to receive the educational and social benefits of a daycare environment, and this should be a decision that is the prerogative of a parent and not dictated by some conceived rights of the paternal grandparents. The Chancellor below impermissibly favors the rights of the paternal grandparents over those of the natural mother and finds fault with her parental decisions in this regard. This amount to an abuse of discretion by the trial court.

The lower court cited *Jordan v. Jordan*, 963 So. 2d 1235 (Miss. Ct. App. 2007) holding that the presence of an extended family can contribute to the stability of a child's life and be a factor to weigh in custody determination. In *Jordan*, however, the consideration of the presence of extended family favored one parent who had extended family in the area where the children had been living over one who did not. *Id.* This was found this to provide more stability for the children. *Id.* This is distinguishable in the case at bar. Shane does not have extended family in or near Ocean Springs, Mississippi. In fact, Shane's extended family, the paternal grandparents of the girls, live in Lincoln

County, where April lives. The court's justification for relying on the presence of the paternal grandparents in the girls' lives is unfounded considering the facts of this situation. The fact that the paternal grandparents live in Lincoln County should not favor Shane over April considering Shane lives three hours from Lincoln County and April lives in Lincoln County. The Chancellor's finding in this regard is manifestly wrong and erroneous and constitutes an abuse of discretion. Even so, the Mississippi Court of Appeals has stated that a mother "should not be penalized because she does not have a large family nearby." *Watts v. Watts*, 854 So.2d 11, 15 (Miss. Ct. App. 2003). To do so would be manifestly unfair and unjust.

The second "other factor" is the Chancellor's consideration of what he describes as "inaccuracies, inconsistencies, misrepresentations, or bad judgment." Under this subfactor, the Chancellor discussed several details and minutiae which it considered to indicate bad judgment on the part of April. There was no discussion whatsoever of any inaccuracies, inconsistencies misrepresentations or bad judgment noted on the part of Shane, however. In fact, nowhere throughout the more than ninety page ruling does the Chancellor ever equally assess the *Albright* factors between April and Shane, rather the court merely goes to great lengths to justify a custody determination in favor of Shane.

One example cited by the Chancellor involved Shane's visitation with the children while he was working in Virginia. The court deems April's testimony that Shane visited the children "occasionally" while he was in Virginia as a misrepresentation or inaccuracy. [R.E. 0076; R. 328]. The court notes Shane's testimony that he negotiated into his contract that he would fly home to Mississippi at least every three weeks. As the primary, if not sole caretaker of the children during this time, it seems highly credible and likely that April could deem Shane's visits every three weeks or so to be occasional. It seems unduly harsh if not erroneous to describe this as a misrepresentation

on April's part. The court also criticizes and apparently deems April's testimony regarding continuing to live in Brookhaven to be an "inaccuracy, inconsistency or misrepresentation" merely because April may have changed her mind from December 2006 to August 2007, during which time she was going through this divorce. [R.E. 0076-0077; R. 328-29]. The court not only fails to account for the emotional toll a divorce can take on a person and the uncertainty about future plans a divorce causes, but abuses its discretion by allowing her testimony and decisions about where she chooses to live to negatively affect April in the Chancellor's determination of custody. Moreover, the right to travel and relocate is a fundamental right protected by the United States Constitution. *See Bell v. Bell*, 572 So.2d 841(Miss. 1990)(citing *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902-03 (1986); *Zobel v. Williams*, 457 U.S. 55 (1982); *Edwards v. California*, 314 U.S. 160, 183 (1941)).

Lastly, the Chancellor questions April's credibility and her respect for the court and erroneously places too much emphasis on April's decision to go to Maine and the events following. [R.E. 0080; R. 332]. This decision and the following events do not render April unfit for custody nor should those facts create a disparity between April and Shane in the court's application of the *Albright* analysis and the court's determination of custody based on the best interests of the children. All of the facts surrounding the court's initial TRO hearing and initial award of temporary custody to Shane are not fully discussed or considered. When April went to Maine on October 20, 2006, there was no order regarding custody entered by the court and custody was not even in dispute. It was not until October 27, 2006 that Shane filed his Counter-Complaint for Divorce in which he requested a TRO and emergency hearing. The court granted the hearing in less than 48 hours fully aware that April would not be able to return from Maine to attend. Furthermore, the court refused to continue the hearing or allow April to appear telephonically even though she was ready and

available to appear telephonically. The hearing was held on November 2, 2006 and the TRO was granted despite the fact that no immediate and irreparable danger, harm or loss was proven. No credible evidence was shown that the girls were in any harm or danger whatsoever or that Shane had suffered any immediate or irreparable harm or loss. Shane's argument that he suffered a loss of parental rights was disingenuous because there was no evidence that he was prohibited from seeing the girls, talking to the girls or that April and the girls were in hiding. Shane was notified before the hearing and before the filing of his counter-complaint that April and the girls were in Maine with April's brother and his family. Moreover, Shane suffered no loss or harm because he was not even in Mississippi during this time period but rather was living and working in Charlottesville, Virginia. Nevertheless, the court granted the TRO and went a step further and awarded temporary physical and legal custody to Shane. Also, the time period before, during and after the TRO hearing, April was in consultation with her attorneys in Mississippi and later Maine and making inquiries regarding her legal rights. Also, the record reflects that one of April's attorneys in Mississippi advised her to return to Mississippi with the children on November 21, 2006, and April left the very next morning. The court unfairly emphasizes all of these events and harshly condemns April for these alleged poor decisions yet nothing April did adversely impacted the welfare of the children or should have deemed her less-suited to have custody of the girls for whom she had always been the primary caregiver. The court's apparent animus toward April from this time forward resulted in a clearly inequitable *Albright* analysis laden with errors and not supported by substantial and credible evidence. The "other factors" considered by the trial court have no legitimate bearing on the best interest of the children, and these "other factors" were improperly relied upon by the Chancellor to attempt to justify an award of full physical and legal custody to Shane where such a finding is not supported by substantial, credible and relevant evidence in the record. In so doing, the trial court

failed to consider any evidence under any factor that favored April and glaringly ignored substantial evidence relevant to this custody determination and worthy of the court's consideration. The trial court's application of the *Albright* analysis was clearly erroneous as a result and the award of full physical and legal custody to Shane was manifestly wrong and an abuse of discretion necessitating reversal and an award of custody to April.

IV. Alternatively, the Court erred by failing to award the parties joint legal custody of the children.

Alternatively, the Court erred by not awarding joint legal custody to the parties. Plaintiff is uniquely qualified to assist with the health, education and welfare of her children by virtue of her hands-on experience with the children, her professional education and her years of continuing care as primary caregiver to her young children. The best interest of the children would certainly be served by awarding joint legal custody, if not joint legal and physical custody, to April. The lower court made no specific finding as to why joint legal custody should not be awarded in this case. To deny joint legal custody to April is not in the best interest of the parties' young girls and unjustifiably prohibits April from having any decision-making power in the lives of their children. The Chancellor could have and should have, at the very least, awarded joint legal custody to April. *See Crider v. Crider*, 904 So. 2d 142, 147 (Miss. 2005). Additionally, the GAL report clearly recommends joint legal custody. [R.E.00109; Ex. GAL-1-Findings and Recommendations, p.4]. The Chancellor stated in his ruling that he has no reason to reject the guardian ad litem's findings and believes them to be in the best interest of the children. However, the Chancellor obviously rejected the guardian ad litem's recommendation in this regard when he awarded full physical *and* legal custody of the girls to Shane. The Chancellor states no specific reason for denying April joint legal custody and makes no findings as to why he rejects the GAL report in this regard. Mississippi case

law states that a Chancellor *must* include his or her reasoning for rejecting a guardian ad litem's recommendations. *See Lorenz v. Strait*, 2007-CA-00322-SCT (Miss. Jul. 31, 2008). The Chancellor erred in this regard and erred in awarding legal custody solely to Shane.

V. The Court erred in requiring April to be responsible for all medical expenses not covered by insurance.

The Court erred in the Final Judgment of Divorce by requiring April to be *solely* responsible for all reasonable and necessary health care expenses of the minor children not covered by health insurance. This is an expense which should be borne equally between the parties. The Chancellor gave no justification for why April should bear this expense alone. The evidence confirms that April makes notably less money than Shane and is no greater financial position to bear this expense alone. Therefore, this Court should reverse the Chancellor's finding and render a decision that medical expenses not covered by health insurance be borne equally between the parties. The Mississippi Supreme Court has stated that uninsured medical costs are "extraordinary expenses" on to covered by basic child support, and a Chancellor may order the payment of *one half* of all medical expenses as an addition to regular child support. *See Hoar v. Hoar*, 404 So. 2d 1032, 1036 (Miss. 1981). It is not contemplated that a non-custodial parent should pay the entirety of *all* uninsured medical expenses, which could be extraordinary, in addition to the payment of child support. At most, April should have to pay one half of all medical expenses not covered by health insurance. The Chancellor's ruling requiring April to pay for all such medical expenses should be reversed.

CONCLUSION

Based on the foregoing, April contends that the lower court was manifestly wrong, applied erroneous legal standards, based its findings on erroneous and incomplete facts and ultimately abused its discretion in its application of the *Albright* analysis and in awarding sole physical and

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:

Brady Kellems
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Honorable Edward E. Patten, Jr.
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This the 11th day of September, 2008.

COREY D. HINSHAW