

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2008-CA-00641**

**LISA MARIE MONTGOMERY**

**APPELLANT**

**VS.**

**KELLY MCCOY MONTGOMERY, JR.**

**APPELLEE**

**APPEAL FROM THE CHANCERY COURT OF PONTOTOC COUNTY,  
STATE OF MISSISSIPPI**

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**BRIEF OF APPELLEE**

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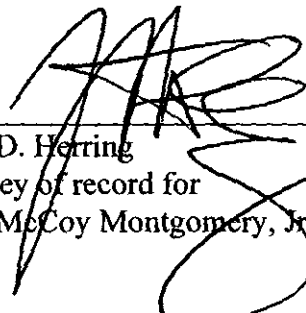
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**ORAL ARGUMENT NOT REQUESTED**

### **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Lisa Marie Montgomery, Appellant  
Kelly McCoy Montgomery, Jr., Appellee  
D. Kirk Tharp and R. Shane McLaughlin, attorneys for Appellant  
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**STATEMENT REGARDING ORAL ARGUMENT**

While Appellee's counsel would welcome the opportunity to present this case orally, Appellee does not believe oral argument would be helpful to the Court in light of the straightforward nature of the issues on appeal.

### **STATEMENT OF THE ISSUES**

1. Whether the Chancellor failed to properly consider the separation of the parties' children and Lisa Marie Montgomery's child from another relationship when the separation has not shown an adverse affect on the children.
2. Whether the Chancellor erred in overemphasizing Lisa Marie Montgomery's adulterous affair as part of the Albright analysis, and whether the decision amounts to a punishment for the affair.
3. Whether the Chancellor abused her discretion by concluding that the factors of age, health and sex, capacity to provide primary child care, employment responsibilities and the emotional ties of the parents with the children favored neither party, where Lisa Marie Montgomery admitted and knew that the adulterous relationship would impact her position with regard to custody of the children but still voluntary left her family to pursue the relationship.
4. Whether the Chancellor abused her discretion by concluding that the continuity of care of the children, parenting skills, moral fitness, and stability of the home environment and employment factors favored the father Kelly McCoy Montgomery, Jr., wherein he had a stable home environment and employment history, an extensive support group of extended family in the area, and a home with adequate space for the children.



### **STATEMENT OF THE CASE**

Kelly McCoy Montgomery, Jr., filed his Complaint in this matter seeking divorce and other relief from his wife Lisa Marie Montgomery on June 6, 2006, in the Chancery Court of Pontotoc County. (C.P. p. 1-6).<sup>1</sup> Prior to trial, the Parties reached an agreement as to a division of marital property. (T. p. 6).

The remaining issues of child custody, visitation, child support and medical expenses were tried on December 5, 2007, and January 3 and 18, 2008, before Chancellor Jacqueline Estes Mask. (T. p. 7, 128, 383). Following the trial, the Chancellor granted Kelly McCoy Montgomery, Jr., and Lisa Marie Montgomery a divorce based on irreconcilable differences. (C.P. p. 55). Chancellor Mask then awarded joint legal custody of the children to both parties and primary physical custody of the minor children to Kelly McCoy Montgomery, Jr., subject to visitation by Lisa Marie Montgomery. (C.P. p. 75). The Opinion and Judgment of Divorce was entered on January 25, 2008. (C.P. p. 59). Lisa Marie Montgomery timely appealed the Chancellor's decision to this Court. (C.P. p. 77).

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<sup>1</sup> Clerk's Papers are cited as "C.P." and the trial transcript is cited as "T."

## STATEMENT OF FACTS

Kelly McCoy Montgomery, Jr., ("MJ") and Lisa Marie Montgomery ("Lisa") were married on June 10, 2000.<sup>2</sup> (C.P. p. 1). Prior to their separation MJ and Lisa resided in Pontotoc, Mississippi, in a double-wide manufactured home on land adjacent to MJ's Parents and other extended family members. (T.p. 14, 217-218). The home has four bedrooms and two bathrooms and plenty of space for the entire family. *Id.* The home is peaceful and very pleasant. (T.p. 170).

MJ and Lisa have three children from their marriage, namely, Chase McCoy Montgomery, born on December 6, 2000, Coleden Baily Montgomery born on December 11, 2002, and Amber Paige Montgomery, born on April 9, 2004. (T.p. 131). Lisa had one child, Christian, from a previous relationship. (T.p. 132). Both parents were the primary caregivers of the minor children prior to the events leading up to Lisa and MJ's separation. (T.p. 249-250).

Lisa has worked at four different jobs since 2000 and at the time of the trial was working at Southern Dreams in Ecu, Mississippi. (T.p. 175-176). MJ has an established work schedule with Super Sagless in Tupelo, Mississippi, where he had been employed for over four years at the time of the trial. Both Lisa and MJ were working full time when Lisa began pursuing her extra-marital affair with Joe Betancourt, whom she meet at work. (T.p. 46, 402, 432 -437).

At the beginning of the affair, MJ notice that Lisa spent a lot of time on the telephone and readily became the primary caregiver tasks that the parties had been sharing with respect to the children. (T.p. 147-148, 282-285). Once Lisa began her relationship with Joe, she moved out and separated from MJ leaving him with the parties' children as well as her child from a

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<sup>2</sup>

Kelly McCoy Montgomery, Jr. is referred to by his nick name, "MJ," throughout the trial transcript and Lisa Marie Montgomery is referred to by "Lisa" and "Lisa Marie." Accordingly, for consistency and ease of reference, "MJ" and "Lisa" are used herein.

previous relationship. *Id.* After the separation, Lisa agreed to give MJ temporary physical custody of the children and MJ clearly became their sole primary caregiver as he was then responsible for preparing the meals, administering baths, providing activities for the children and etc. *Id.* MJ excelled at his role as the primary caregiver of the children and was considered by Lisa to have fine parenting skills. (T.p. 154).

Lisa did continue to maintain her relationship with the children by visiting them. (T.p. 257). However, Lisa failed to bring Christian, her child from a previous relationship, along with her to the visits with the parties' children and instead left him with her parents. *Id.* During Lisa's visitation periods with the children, she admitted to violating the Agreed Temporary Order by both smoking and using foul or vulgar language in the presence of the children. (T.p. 139-140, 212). Likewise, she admitted to having one of her new lovers at her house in the presence of the children and there was some evidence presented at trial that she had at least one man, other than her husband, stay overnight with her in the presence of the children during the separation. (T.p. 137-139, 314). Furthermore, since the separation in September and up until the date of the trial, Lisa admitted to not paying or providing MJ with any financial support for the children and living in four different places during the previous 15 months. (T.p. 135, 172, 255-256).

Following the three-day trial, which consisted of five witnesses, the trial court took the matter under consideration and rendered its opinion a few days later on January 25, 2008. (C.P. p. 59). The trial court discussed each *Albright* factor in detail in its Order Granting Motion Pursuant to M.R.C.P. 52 and Supplemental Opinion (C.P. p. 66-75). The trial court found, in considering all of the factors, that MJ was favored over Lisa in five distinct *Albright* factors, (1) the continuity of care prior to separation, (2) parenting skills, (3) moral fitness of the parents, (4) home, school and community record of the child, and (5) stability of the home. *Id.* The trial

court also determined that with respect to the age, health and gender of the children factor, MJ would be slightly favored for Chase and Coleden, and Lisa would be slightly favored with regard to Amber. *Id.*

Lisa has appealed the Chancellor's ruling to this Court. As discussed below, the Chancellor's analysis of the *Albright* factors was manifestly correct, and was certainly no abuse of discretion. Accordingly, all of Lisa's arguments are wholly meritless and the Chancellor's decision should be affirmed.

## STANDARD OF REVIEW

The scope of review of a Chancellor's custody determination is limited to whether the Chancellor abused his discretion, was manifestly wrong or applied an incorrect legal standard. *Ivy v. Ivy*, 863 So.2d 1010, 1012 (Miss. Ct. App. 2004). A Chancellor's findings of fact will not be disturbed where they are supported by substantial evidence. *Cooper v. Crabb*, 587 So.2d 236, 239 (Miss. 1991). The Mississippi Court of Appeals has held:

The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.

The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

*Carter v. Carter*, 735 So.2d 1109, 1114 (Miss. Ct. App. 1999). That is, the Appellate Court "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So.2d 405, 412 (Miss. 2000). Rather, the Court has stated "[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor". *Bower*, 758 So.2d at 412.

In this case, the Chancellor applied the proper legal analysis, her decision as to each *Albright* factor was supported by substantial evidence and the Chancellor in no way abused her discretion. Accordingly, the Court should affirm the Chancellor's custody determination.

### **SUMMARY OF THE ARGUMENTS**

The Chancellor in this case applied each of the applicable *Albright* factors in a thorough and detailed on-the-record analysis. The Chancellor determined that the continuity of care prior to the separation factor, parenting skills factor, moral fitness factor, the home, school and community record factor, and stability of the home environment factor all weighed in favor of MJ having custody of the children. The Chancellor correctly ruled that none of the *Albright* factors weighed in favor of Lisa solely.

The Chancellor's *Albright* analysis is manifestly supported by the evidence submitted at trial. The evidence established that MJ had an extremely stable and safe home that has adequate space for the children and is surrounded by his extended family that is willing to help him with caring for the children, if needed. Moreover, the evidence presented was undisputed that MJ is an excellent father that puts the needs and concerns of his children first and foremost and that the home, school and community record factor correctly favors MJ, because in part, he ensures that the children attend church regularly and that Chase, whom had been doing extremely well at his current school, would have to change schools if Lisa was awarded physical custody. In contrast, Lisa had an extremely unstable home and employment history and decided to pursue her romantic interests outside the marriage while leaving her children, including a child by another man, at home with MJ to raise and nurture. As to moral fitness, the evidence established that Lisa has engaged in adulterous affairs with two different men, and that she admittedly cursed and smoked in the presence of the children in direct violation of the Agreed Temporary Order. The Chancellor properly determined that the moral fitness factor weighed in favor of MJ.

The Chancellor's decision that the age, health and sex factor solely favored neither party is likewise supported by substantial evidence. The testimony at trial established and the

Chancellor properly determined that MJ would be slightly favored with regard to the parties' sons, Chase and Coleden, and Lisa would be slightly favored as to the parties' daughter, Amber, and therefore determining that neither parent is completely favored with respect to the age, health and sex factor.

Further, the Chancellor was manifestly correct in concluding that MJ was slightly favored in the continuity of care and parenting skills factors, since the evidence clearly established that Lisa agreed to allow MJ to have temporary custody of the children after the separation, and that she moved out of the house to pursue her extramarital affair, leaving the children with MJ. Following the separation, MJ prepared meals, made sure the children attended church, helped with the children's homework, actively participated in activities with the children and provided for the children's needs which was undisputed. Additionally, Lisa admitted in Court that MJ had done nothing wrong, thus agreeing with the Chancellor's findings.

Similarly, the Chancellor's finding that MJ's home environment was more stable than Lisa's was not an abuse of discretion, as there is no evidence indicating any instability in MJ's home, and the fact that MJ and the children were living in the same home prior to and after the separation, in contrast to the fact that Lisa had resided in four different locations since the separation. Furthermore, Lisa's current home has only two bedrooms and she also has another child living with her in contrast to MJ's home with four bedrooms.

Even a cursory review of the record and the Chancellor's decision exhibits that the Chancellor considered all of the *Albright* factors, rather than emphasizing merely on Lisa's adulterous affair, as alleged in Appellant's Brief. In fact, the Chancellor expressly stated in her opinion that the Court conducted an analysis of the credible evidence based on all the factors and that in all child custody decisions, the best interest of the child is the polestar consideration.

The Chancellor correctly applied the *Albright* factors in determining the best interests of the minor children, and properly awarded physical custody to MJ. Lisa's arguments, at their best, simply dispute the weight the Chancellor afforded to the evidence. The Chancellor's findings are supported by substantial and overwhelming evidence in the record and are not an abuse of discretion. Accordingly, the Chancellor's decision should be affirmed.

#### **ARGUMENT I.**

#### **THE CHANCELLOR PROPERLY ANALYZED THE SEPARATION OF THE SIBLINGS IN AWARDING CUSTODY TO KELLY MCCOY MONTGOMERY, JR.**

The Court in this case properly analyzed the separation of the siblings under the "other factors" prong of *Albright* in awarding custody to MJ, as correctly stated by the Appellant in that "the relationship of half-siblings should be evaluated under the 'other factors' prong of *Albright*." *McWhirter v. McWhirter*, 811 So.2d 397, 399 (Miss. Ct. App. 2001). The Court stated that "the preference for keeping siblings together when possible should be considered as well as the holding of our appellate courts that '[t]here is no 'hard and fast' rule that the best interest of siblings will be served by keeping them together." (C.P. 074)(citing *Copeland v. Copeland*, 904 So.2d 1066, 1076 (Miss.2004) (citations omitted)).

The Court properly took into consideration that Lisa had a child from her prior relationship and that all children in this case had relationships with each other. However, this Court also took into consideration all the remaining *Albright* factors and clearly determined that this consideration alone was not enough to negate the five factors that were in MJ's favor. Although the Chancellor did not state it in her ruling, it should also be clearly acknowledged that even after the temporary order was in place, Lisa failed to



bring Christian, her child from a previous relationship for whom the entire separation of siblings argument is made, to visit with the other three children, but instead left him with her parents. (T.p. 257). Lisa stated further that “he didn’t want to go.” *Id.* However, Lisa failed to acknowledge and show that the separation has hurt the children’s relationships with each other, and she even admitted that throughout the separation, while Christian has been separated from his three siblings, the children have all maintained a good relationship. (T.p. 251-252).

Furthermore, the Appellant even stated in her brief that the “Mississippi Supreme Court has not adopted a per se rule stating that Chancellors should not separate siblings. *Sparkman v. Sparkman*, 441 So.2d 1361, 1362 (Miss. 1983).” There are many cases in which the courts found that separating siblings were in the best interest of the minor children. *See Bowen v. Bowen*, 688 So.2d 1374, 1381-82 (Miss.1997); *Bell v. Bell*, 572 So.2d 841, 846 (Miss.1990); *C.W.L. v. R.A.*, 919 So.2d 267, 273 (Miss. Ct. App. 2005). The Mississippi Court of Appeals properly noted that “none of those cases hold that it is improper to consider whether to separate siblings as a factor in awarding custody. Instead, they reaffirm that it is one factor to consider in determining the best interests of the children. *See Bowen*, 688 So.2d at 1382; *Bell*, 572 So.2d at 846; *C.W.L.*, 919 So.2d at 272-73 (¶¶ 19-21).” *Marshall v. Harris*, 981 So.2d 345, 348 (Miss. Ct. App. 2008). So just like the Chancellor in this particular case correctly analyzed the separating of the siblings as one factor to consider along with the *Allbright* factors, the Court indicated in *Marshall* that:

[i]n *C.W.L.*, this Court stated that it is not a general rule that it is in the best interest of siblings to remain together. *C.W.L.*, 919 So.2d at 273(¶ 21) (citing *Sellers v. Sellers*, 638 So.2d 481, 484 (Miss. 1994)). We see no inconsistency in this statement because the supreme court has always

stated there was no such per se rule. *See Sparkman*, 441 So.2d at 1362. What was important in *C.W.L.* was that the chancellor properly considered the *Albright* factors and that there was substantial evidence to support the custody order. *C.W.L.*, 919 So.2d at 272-73 (¶¶ 19-20). Furthermore, *Sellers*, which we relied on in *C.W.L.*, recognized that the courts should try to keep siblings together if possible. *Sellers*, 638 So.2d at 484 (quoting *Mixon v. Bullard*, 217 So.2d 28, 30 (Miss. 1968)).

*Id.*

Therefore, the Appellant's argument fails because in this particular case, the Chancellor precisely stated that she took into consideration the separation of the siblings and clearly determined that it was in the best interest of the children for MJ to have physical custody. Clearly, this argument that the judge abused her discretion by not determining that the separation of siblings' factor should outweigh all of the remaining factors under *Albright* is without merit and should be dismissed.

## **ARGUMENT II.**

### **THE CHANCELLOR PROPERLY ANALYZED EACH OF THE ALBRIGHT FACTORS AND DID NOT OVEREMPHASIZE LISA MARIE MONTGOMERY'S ADULTEROUS AFFAIR.**

The Appellant correctly states that the polestar consideration in making a custody determination must be the best interest of the child. *Albright*, 437 So.2d at 1005. The Court in *Albright* set out several factors which should be considered in determining the child's best interest. *Albright*, 437 So.2d at 1005. However, as one commentator has noted "the difficult question of custody between two fit parents can never be reduced to a formula. Each case is different – judges are given great discretion to determine the arrangement that best serves the needs of a particular child." DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 5.02 (1st ed. 2005).

As Appellant further points out, the Mississippi Supreme Court has held that a Chancellor may not “sanction” a party for marital fault in making the custody determination. *Albright*, 437 So.2d at 1005; *Brekeen v. Brekeen*, 880 So.2d 280, 287 (Miss. 2004). However, while the Chancellor may not allow marital fault, such as adultery, to be the sole basis for his decision, such conduct is properly considered in the *Albright* analysis. *Carr v. Carr*, 480 So.2d 1120, 1123 (Miss. 1985) (noting that adultery should be weighed along with other *Albright* factors).

Contrary to Appellant’s arguments, the Chancellor in this case did not place more emphasis on Lisa’s extra-marital affair than she did on the remaining *Albright* factors. Rather, the Chancellor viewed all of the factors, taken as a whole, in making her decision as to the best interests of the children. It must be remembered that the Chancellor found that none of the *Albright* factors completely favored Lisa. A summary of the Chancellor’s *Albright* analysis is as follows:

1. Age, health and sex of the child – The Chancellor ruled that these factors slightly favored MJ with regard to Chase and Coleden, and slightly favored Lisa with regard to Amber. The evidence established that either party could sufficiently care for the children but the Court ruled in favor for MJ on two of the three children.
2. Continuity of care prior to separation – The Chancellor ruled that this factor favored MJ since both parties had been involved with the care of the children and that Lisa agreed to the placement of temporary custody of the children with MJ.
3. Parenting Skills – The Court found that both parties had been extensively involved in the care and upbringing of the children prior to the separation,

however, Lisa's role diminished in the time leading up to the separation due to her pursuit of the romantic relationship and Lisa even acknowledged that she expected that her new relationship would impact her position with regard to custody. The Court decided that for the purposes of this decree that the factor slightly favored MJ and Lisa even acknowledged that he had been a good father.

4. The willingness and capacity to provide the primary child care to the child – The Court determined that both parties expressed a desire for custody of the children and that both will require assistance from time to time in caring for the children. Thus, the Court found that this factor favored neither party.
5. Employment and employment responsibilities of the parents – The Court found that this factor favored neither party because both parties could arrange their work schedules to ensure an established routine that could provide comfortable care for the children.
6. Physical and mental health and age of the parents – At the time of this Court's ruling, both MJ and Lisa were twenty-five years old. The Court noted that Lisa smokes and MJ uses chewless tobacco and the Court found that this factor favored neither party.
7. Emotional ties of parent and child – The Court found that both parents love their children and were closely involved in the children's lives and this factor was therefore equal.
8. Moral fitness of the parents – The Court unequivocally found that this factor favored MJ which was chiefly supported by Lisa's admitted extra-marital affair with Joe.

9. Home, school and community record of the child – The Court found this factor to favor MJ. The Court determined that if the children remained with MJ, he would have family nearby, which would be helpful and beneficial with caring for the children. The Court also took into consideration that Chase would be required to change schools if Lisa was awarded custody and that the children regularly attend church with MJ's family and did not attend while with Lisa.
10. Preference of the Child – The Court found that none of the children were of an age to express their preference to the Court.
11. Stability of the home environment of each parent – The Court found that this factor slightly favored MJ since his home situation was stable and the fact that Lisa had resided at four different locations since the separation. The Court also took into account the fact that Lisa had another child living with her and that MJ's residence, which was the former marital residence, was twice the size of Lisa's residence and would not require the children to share rooms unlike Lisa's residence.
12. Other factors –
  - A. The Court took into consideration the separation of the children from Lisa's child from a prior relationship and that there is not a rule that states that the best interest of the children would be served by keeping them together.
  - B. The Court also determined that the credible proof failed to establish that domestic violence would warrant consideration of the presumption set forth in MISS. CODE ANN. § 93-5-24(9) regarding the presence of domestic violence in the home.

As demonstrated above, the Chancellor did not overemphasize Lisa's adultery, but instead it was just one of the many considerations that the Court used to determine that MJ was the proper party to receive custody of the children.

Of course, this is exactly what the Chancellor was supposed to do pursuant to *Albright* and its progeny. The *Carr and Brekeen* cases cited by Appellant only serve to further support the Chancellor's decision in this case. Appellant first cites *Carr v. Carr*, 480 So.2d 1120 (Miss. 1985). In *Carr*, the Chancellor found that both the mother and father were fit to have custody of the minor children. *Carr*, 480 So.2d at 1121-22. The Chancellor, citing the fact of the mother's adulterous affair, found that it was in the best interest of the children for the father to have custody. *Id.* at 1123. The Supreme Court noted that the trial court had evaluated all of the factors, not just the mother's adultery, in determining the child's best interest, and that the adultery properly played a role in the decision. *Id.* at 1124. Accordingly, the Supreme Court affirmed the Chancellor's decision awarding custody to the father. *Id.*

In addition, in *Williams v. Williams*, the Supreme Court likewise affirmed a Chancellor's decision where the trial court evaluated one party's adultery as a factor in determining custody. 656 So.2d 325, 330 (Miss. 1995). The Chancellor, much like the present case, weighed the moral fitness factor against the party who participated in the adulterous affair, but expressly stated that this was not the sole determinative factor. *Id.* Accordingly, the Supreme Court in *Williams* affirmed the trial court's custody determination. *Id.*

This case should be analyzed similarly to both *Carr* and *Williams*. In *Carr* and *Williams*, the Supreme Court noted that the Chancellor properly considered all of the factors, along with one spouse's adultery. Here, the Chancellor similarly weighed each *Albright* factor, and explained that Lisa's adultery was not the sole determinative factor, but that she was basing her decision on all of the factors together. Pursuant to the reasoning of *Carr* and *Williams*, the

Chancellor's *Albright* analysis was manifestly correct, and her decision should therefore be affirmed.

The next case cited by the Appellant in support of her argument was *Brekeen v. Brekeen*, 880 So.2d 280 (Miss. 2004). However, the facts of this particular case, and the Chancellor's *Albright* analysis, are wholly dissimilar to *Brekeen*. In *Brekeen*, the Chancellor failed to make any specific findings as to most of the *Albright* factors and found the continuity of care factor in favor of the mother, yet nevertheless awarded custody to the father based exclusively on the mother's extra-marital affair. *Brekeen*, 880 So.2d at 285. The Chancellor in *Brekeen* failed to discuss the "other factors" of *Albright*, and referenced only the adultery of the mother, in stark contrast to the Chancellor's opinion in this case. *Id.* at 286. The Supreme Court stated that the record clearly indicated that the Chancellor placed too much weight on the affair. *Id.* The Chancellor's decision in *Brekeen* is, of course, completely different from the decision here, as the Chancellor in this case weighed, analyzed and thoroughly discussed each *Albright* factor, found none solely in Lisa's favor, and found five separate factors solely in favor of MJ.

Lisa disputes the Chancellor's view of the evidence regarding MJ's prior viewing of pornography and stated that the Chancellor failed to consider MJ's pornography use in the moral fitness factor. MJ admitted that he had, in the past, looked at pornography on the computer and other forms of self help videos. (T.p. 273, 301). However, MJ clearly testified that Lisa watched the videos and looked at the pornography with him, a fact that Lisa also admitted. (*Id.*) Lisa readily admitted to viewing the pornography with MJ and that when it was viewed by MJ, it was done behind locked doors and that they had never done so in the presence of children, and that the viewing of pornography had no adverse effect on the children. (T.p. 232-236, 271). The materials which they had viewed were, however, legal. (T.p. 273-274).

It was in the Chancellor's discretion to weigh Lisa, and her admitted ongoing affair, against MJ and Lisa together with their admitted previous pornography viewing in analyzing the moral fitness aspect of *Albright*. The Chancellor found that, based on the evidence, MJ should be favored as to moral fitness. This conclusion is completely supported by the record. MJ and Lisa's occasional viewing of pornographic material was not nearly so pervasive as was Lisa's affair, in that it was not done in the presence of the children, and did not destroy the marriage as the affair did. In fact, the couple even watched the videos together for self help.

Finally, Lisa on the other hand, honestly admitted that "morally, I know I failed in that position..." (T.p. 224). The evidence at trial simply showed that MJ was more morally fit than was Lisa. Clearly the Chancellor was within her discretion in weighing the moral fitness factor in favor of MJ under these circumstances.

### **ARGUMENT III.**

**THE CHANCELLOR DID NOT ABUSE HER DISCRETION BY CONCLUDING THAT THE AGE, HEALTH AND SEX OF THE CHILDREN; THE CAPACITY TO PROVIDE PRIMARY CHILD CARE; EMPLOYMENT AND EMPLOYMENT RESPONSIBILITIES; AND EMOTIONAL TIES OF THE PARENT AND CHILDREN FACTORS WERE NEUTRAL.**

#### **1. Age, Health and Sex Factor**

Lisa next takes issue with the Chancellor's decision as to the age, health and sex of the children; the capacity to provide primary child care; employment and employment responsibilities; and emotional ties of the parent and children factors of *Albright*. As to the age, health and sex of the children, the Chancellor found that the factors weighed slightly in favor of MJ for Chase and Coleden, the male children of the parties, and slightly favored Lisa with regard to Amber, the female child of the parties. Lisa contends that she should have been given an advantage as to this factor pursuant to the "tender years" doctrine.



The “tender years” doctrine has been significantly weakened under Mississippi law in recent years. *See Copeland v. Copeland*, 904 So.2d 1066, 1075 (Miss. 2004). Under Mississippi law, Courts may no longer base a custody determination solely on a presumption that a mother is a superior custodian. *See, e.g., Albright*, 437 So.2d 1005. The “tender years” doctrine is even less applicable when the child is a male. *Copeland*, 904 So.2d at 1075 (quoting *Law v. Paige*, 618 So.2d 96, 101 (Miss. 1993)). Indeed, the fact that a child is male weighs in favor of the child’s father. *See Bass v. Bass*, 879 So.2d 1122, 1124 (Miss. Ct. App. 2004).

Further, the Mississippi Supreme Court has held that “a child is no longer of tender years when that child can be equally cared for by persons other than the mother.” *Mercier v. Mercier*, 717 So.2d 304, 307 (Miss. 1998). Thus, the “tender years” doctrine may be inapplicable, and the age, health and sex factor may favor neither party, even where the child is very young. *In re M.D.B.*, 914 So.2d 316, 320 (Miss. Ct. App. 2005) (stating that age, health and sex factor favored neither party where child was a one year old male). *See also Webb v. Webb*, 974 So.2d 274 (Miss. Ct. App. 2008)(holding that the chancellor did not error by awarding custody of eighteen month old boy to father). The Court in support of its determination of this factor mentioned *Brewer v. Brewer*, in that a “chancellor did not err in awarding custody of four-year old daughter to the father.” 919 So.2d 13 (Miss. Ct. App. 2005).

In this case, the male children were seven and five years old and the female child was three years old at the time of trial. Therefore, only two of the children would even possibly be considered under the tender years doctrine at this current time. The evidence at trial established that MJ was, at the very least, equally able to care for all three children. (T.p. 150, 282, 285-287). The evidence further demonstrated that since Lisa began her extra material affair, the children were no longer her top priority and that she was more interested in pursuing the affair than raising her children. (T.p. 147-148, 282-285). Closer to the separation, Lisa stayed on the

telephone continuously with her new romantic interest and when she left the marital home, she not only left the parties' three children but also, Christian, her son from another relationship, with MJ to raise. *Id.* In fact, Lisa herself admitted that MJ had not made any mistakes and that she had no problems with him, but instead expressed issues with his mother and his work schedule (T.p. 177, 216, 252).

Pursuant to the reasoning of *Mercier*, Lisa was not entitled to an advantage based on the “tender years” doctrine since the evidence clearly established that MJ was, at a minimum, equally able to care for the male children. The Chancellor was certainly within her discretion in finding that MJ was slightly favored for the male children and that Lisa was slightly favored for the female child. Further, as explained in *Copeland*, the “tender years” doctrine is even less applicable in this case with regard to Chase and Coleden since they are males. Finally, even if Lisa was entitled to any advantage based on Chase and Coleden’s age (which she was not), their sex would have nevertheless weighed in favor of MJ, thus explaining why the Chancellor slightly favored MJ with respect to the male children. As exhibited by *In re M.D.B.*, the age, health and sex factors do not necessarily favor the mother, even where the children are very young. Rather, as noted in *In re M.D.B.*, this factor may properly be found to be in the sole advantage of neither party under such circumstances.

Considering the age, health and sex factors together, the Chancellor was correct in concluding that this factor favored neither party solely. Accordingly, Appellant’s arguments in this regard are meritless and are no basis for reversal of the Chancellor’s decision.

## 2. Capacity to Provide Primary Child Care and Employment and Employment Responsibilities

Lisa next argues that the Chancellor erred in finding that the capacity to provide primary child care and employment and employment responsibilities factors favored neither party and

were neutral. Again, however, the Chancellor's decision was supported by overwhelming evidence.

The Court correctly determined that both parties expressed a desire for custody of the children but both parties had full-time employment and would require assistance with the children. Lisa's argument appears to try to penalize MJ for having a presence of extended family to assist him, although "the presence of extended family is a legitimate factor to support awarding custody to a parent." *Messer v. Messer*, 850 So.2d 161, 167 (Miss. Ct. App. 2003) (citing *Neville v. Neville*, 734 So.2d 352, 355 (Miss. Ct. App. 1999)). The Mississippi Court of Appeals has stated further that it "is a legitimate consideration." *Gilliland v. Gilliland*, 969 So.2d 56, 71 (Miss. Ct. App. 2007). Therefore, the Court's determination that both Lisa and MJ would need assistance from extended family was properly determined not to favor either party.

Finally, it is well-established that a stable employment history weighs in a parent's favor under the *Albright* analysis. *Beasley v. Scott*, 900 So.2d 1217, 1221 (Miss. Ct. App. 2005) (father's employment for eleven years favored him over mother who had seven jobs in four years); *Pacheco v. Pacheco*, 770 So.2d 1007, 1011 (Miss. Ct. App. 2000) (stability of employment favored parent who had been employed in the same job for sixteen years, where other parent employed for approximately one year); *Fletcher v. Shaw*, 800 So.2d 1212, 1217 (Miss. Ct. App. 2001) (father's stable employment history compared favorably with mother's unstable employment).

In this case, the evidence at trial established that MJ had been employed by the same company for approximately four years at the time of the trial on December 5, 2007. MJ's job did consist of the second shift, but he was continually looking to be placed in the first shift. MJ's mother, Conna Montgomery, lives next to MJ and assists him daily with an established routine in which the children are accustomed and that it works great for both MJ and the

children. MJ regularly stays in contact with the children even while at work. In contrast to MJ, since 2000 and at the time of the trial, Lisa had four different jobs and had only been working at her current job since April of 2007. Lisa's work history, to say the least, is far less stable than MJ's.

Although, Lisa argues that "[t]his factor of *Albright* properly favors a party who has a flexible work schedule, and is therefore able to provide primary care to the child," there was no credible evidence that Lisa's work schedule was particularly flexible. She instead argues that her schedule is more conventional and therefore she should be favored under this factor. However, she does not explain or even try to defend her inability to maintain a stable employment history unlike MJ, who has a clear stable employment history.

The Chancellor weighed the employment history and work schedules of both parties. There can be no dispute that MJ's employment history is much more stable than Lisa's. Further, there was no credible evidence that showed that Lisa's work schedule was any more flexible than MJ's. Based upon the totality of the credible proof in this matter, the Chancellor was correct in determining that this factor is neutral and there was no abuse of discretion.

### 3. Emotional Ties of Parent and Children

The Appellant made no argument as to her contention that the Chancellor abused her discretion with regard to determining the emotional ties of the parent and children factor was neutral. While one might question Lisa's judgment and foresight as to the emotional damages to the children that likely occurred when she decided to have an extra-marital affair; the Chancellor determined that both parents clearly love the children and were involved with the children's lives equally up until the events leading to the separation, and no abuse of discretion arises from her determination that this factor favored neither party solely. Accordingly, Appellant's arguments in this regard are meritless and are no basis for reversal of the Chancellor's decision.

left MJ to care for the children when she moved out of the marital home to pursue her relationship with Joe Betancourt. *Id.* MJ agrees with Lisa's brief in that some of the important facts to consider when determining who has been the children's primary caregiver includes who prepared the meals, bathed the children, purchased clothes, provided activities for the children and etc. That is precisely what MJ did almost solely after Lisa started pursuing her extra-marital affairs. *Id.* At trial, Lisa even admitted that she "had made a mistake and it cost me my kids, and I understand that..." (T.p. 178).

Furthermore, since the separation in September and up until the date of the trial, Lisa voluntarily gave MJ primary custody of the children and she admitted to not paying or providing MJ with any financial support for the children. (T.p. 135, 255-256). Lisa also clearly testified that during the period since the separation in which MJ had physical custody of the children, he had done nothing to put a negative effect on her relationship with the children. (T.p. 251).

In sum, the overwhelming evidence before the trial court supported the fact that MJ was the children's primary care giver from the beginning of the affair until the time of the trial. The Chancellor aptly summarized the evidence as to continuity of care as follows:

The Court finds that both parties have been involved in the care of the children, but that since the separation, the children have been primarily in the care of M.J. By Agreed Temporary Order dated September 5, 2006, Lisa agreed to the placement of temporary custody of the children with M.J. Lisa contended that the children were primarily cared for by M.J.'s mother, but the credible proof established that M.J. has been the primary custodian and that M.J.'s mother assisted in caring for the children with M.J.'s direction. Lisa's sister also assisted in caring for the children for a short time, but discontinued her role as care giver.

(C.P. p. 69).

Lisa's brief simply disagrees with the Chancellor's view of the evidence regarding continuity of care prior to the separation. Lisa clearly fails to acknowledge that she herself admitted that prior to the affair and separation, that both parties were primary caregivers.

Clearly, the Chancellor's finding that MJ was the primary caregiver at all times after the separation, the continuity of care factor should favor him. Because there is substantial evidence to support the Chancellor's finding in this regard, and indeed the Chancellor's decision conforms with the overwhelming weight of evidence adduced at trial, Lisa's argument is meritless and is likewise no basis for reversal.

## 2. Parenting Skills.

Lisa next claims that the Chancellor erred in finding that the parenting skills factor favored MJ. The Chancellor properly found that the parenting skills factor weighed in favor of MJ. She correctly found that before the separation, "both parties have been extensively involved in the care and upbringing of the children, and neither party established their role in the lives of the children as more prominent than the other prior to the separation." (C.P. p 69). This of course, was also admitted by Lisa during the trial. (T.p. 150, 215). The Chancellor found that after the separation and after Lisa voluntarily gave MJ the children, that "M.J. has prepared meals, helped with homework, taken the children to church, participated in other social activities with the children such as fishing, dressed the children, washed the laundry, served as disciplinarian, and enlisted assistance in caring for the children from family members, who live close by. Lisa acknowledged that M.J. has been a good father." (C.P. p 69). The Court went on to state that "Lisa also had a significant role in caring for the children, which diminished in the time leading up to the separation. The separation was prompted by Lisa's desire to pursue a romantic relationship with 'Joe.'" *Id.* The Court's findings are supported by extensive and credible testimony from various witnesses.

Lisa simply argues that the Court "improperly weighed Lisa's affair against her and it shouldn't have been used in the parenting skills factor." Lisa's argument is simply flawed. The fact that she had an affair is not being weighed against her in this factor, but it is her failure or

her lack of parenting skills while she was pursuing the romantic affair to the point where she left the children and the marital home to pursue her new lover, that is being weighed against her. The fact that she had the affair does not necessarily mean she has bad parenting skills, but the fact that she abandoned her priorities and responsibilities as a parent and left her children with MJ so that she could pursue her affair, is a prime indicator of her lack of parenting skills and inability to make her children a priority in her life.

Lisa attempts to indicate that MJ is a bad parent by stating that “the evidence at trial showed that Lisa was able to prevent the children from being exposed to MJ’s pornographic videotape.” However, Lisa admitted that she and MJ viewed pornography tapes together and that there was no evidence at trial that the children were exposed or suffered any adverse effect from any pornography. (T.p. 271-273). Finally it should be noted that Lisa’s parenting skills should be questioned in that she admitted to violating the Agreed Temporary Order by failing to pay any child support, smoking and using foul or vulgar language in the presence of the children. (T.p. 135, 139-140, 212, 255-256). Likewise, she admitted to having her new lover over at her house in the presence of the children and there was evidence presented that she had at least one man, other than her husband, stay overnight with her in the presence of the children during the separation. (T.p. 137-139, 314).

Finally and most importantly, Lisa admitted that MJ had fine parenting skills and that she had no concern of his parenting skills. (T.p. 154). The Chancellor’s finding that the parenting skills factor slightly favors MJ is supported by substantial evidence and the Chancellor clearly did not abuse her discretion. Therefore, Lisa’s argument is meritless and is likewise no basis for reversal.

### 3. Moral Fitness Factor.

Lisa once again brings up the Moral Fitness factor, but this time tries to take the attention away from her obvious moral failure by way of the affairs and again points to MJ's use of pornography. This time, Lisa again cited *Brekeen* in support of her argument. 880 So.2d at 284 (Miss. 2004). However, the facts of this particular case, and the Chancellor's *Albright* analysis, are wholly dissimilar to *Brekeen*. As described above, in *Brekeen*, the Chancellor failed to make any specific findings as to most of the *Albright* factors, found the continuity of care factor in favor of the mother, yet nevertheless awarded custody to the father based exclusively on the mother's extra-marital affair. *Brekeen*, 880 So.2d at 285. The Chancellor in *Brekeen* failed to discuss the "other factors" of *Albright*, and referenced only the adultery of the mother, in stark contrast to the Chancellor's opinion in this case. *Id.* at 286. The Supreme Court stated that the record clearly indicated that the Chancellor placed too much weight on the affair. *Id.* The Chancellor's decision in *Brekeen* is, of course, completely different from the decision here, as the Chancellor in this case weighed, analyzed and thoroughly discussed each *Albright* factor, found none solely in Lisa's favor, and found five separate factors solely in favor of MJ.

Lisa again disputes the Chancellor's view of the evidence regarding MJ's prior viewing of pornography and stated that she failed to consider MJ's pornography use in the moral fitness. However, as stated before, Lisa readily admitted to viewing the pornography with MJ and that when it was viewed by MJ it was viewed behind locked doors and that they had never done so in the presence of the children, and that the viewing of said pornography had no adverse effect on the children. (T. p. 232-236, 271).

It was at the Chancellor's discretion to weigh Lisa, and her admitted ongoing affair, against MJ and Lisa together with their admitted previous pornography viewing in analyzing the moral fitness aspect of *Albright*. The Chancellor found that, based on the evidence, MJ should



be favored as to moral fitness. This conclusion is completely supported by the record. MJ's occasional viewing of pornographic materials, which was not done in the presence of the children and did not destroy the marriage, was not nearly as pervasive as was Lisa's affair. Likewise, from a moral perspective, Lisa admitted to using foul or vulgar language in the presence of the children. (T.p.139-140, 212). She also admitted to allowing her new lover to visit her house in the presence of the children and there was evidence presented that she had at least one man, other than her husband, stay overnight with her in the presence of the children during the separation. (T.p. 137-139, 314).

Finally, Lisa fails to mention in her brief under her moral fitness factor that she testified at trial that she believed it was important for her children to go to church, but that during her weekend visitation she doesn't take them to church. (T.p. 79, 275-276). However, MJ either takes the children to church or makes sure that they attend. (T. p. 47-48). Lisa honestly admitted that "morally, I know I failed in that position..." (T.p. 224). The evidence at trial simply showed that MJ was more morally fit than was Lisa. Clearly, the Chancellor was within her discretion in weighing the moral fitness factor in favor of MJ under these circumstances.

#### 4. Stability of the home environment of each parent.

Last, Lisa contends that the Chancellor abused her discretion in favoring MJ with respect to the stability of the home environment of each parent factor. The Chancellor correctly determined that:

As recited above, M.J.'s home situation is stable, while Lisa has resided at four different locations since the separation. M.J. continues to reside in the former marital residence, a double-wide manufactured home, with four bedrooms and two baths. Lisa now resides in a two-bedroom, two-bath single-wide manufactured home, and she acknowledged that M.J.'s residence is at least twice as big as her current home and that the children would need to share rooms if they resided with her. Lisa's child by a prior relationship also resides with her.

(C.P. p. 73). It is clear and undisputed that MJ's home is more suitable for the three children. At trial Lisa admitted that MJ's home was safe, peaceful and pleasant. (T.p. 170).

It is also firmly established that the presence of an extended family structure may be considered as supporting a custody award to one parent over the other. *Horn v. Horn*, 909 So.2d 1151, 1161 (Miss. Ct. App. 2005) (noting that Chancellor was correct in considering proximity of relatives and parents). Likewise, "the presence of extended family is a legitimate factor to support awarding custody to a parent." *Messer v. Messer*, 850 So.2d 161, 167 (Miss. Ct. App. 2003) (citing *Neville v. Neville*, 734 So.2d 352, 355 (Miss. Ct. App. 1999)). The Mississippi Court of Appeals has stated further that it "is a legitimate consideration." *Gilliland v. Gilliland*, 969 So.2d 56, 71 (Miss. Ct. App. 2007). It is clear and undisputed that MJ's mother, Conna Montgomery, lives next to MJ and assists him daily with an established routine which the children are use to and that works great for both MJ and the children.

It is inconceivable that Lisa can seriously argue MJ's home is negatively impacted by his past use of pornography, which was admittedly done with Lisa. There has been no evidence presented that the children have ever been exposed to the pornography, but instead Lisa testified that the children were almost exposed to it. Likewise, she did admit that the children had not been affected by the pornography use. Also, MJ's testimony regarding the children's routines at home such as bathing, meals, and etc, would show that his home should be considered to be highly stable.

Finally, it is very important to note that Lisa's home is not stable for many reasons, one of which being that she had moved four times since the separation which was only a fifteen month period. Lisa even failed to dispute that if she obtained custody

of the children, the oldest child would have to switch schools, which would clearly go against the stability of the personal habits of that child. All together, the close proximity of MJ's family and their availability to care for the children along with the adequate size of MJ's home, the children's attendance of church and the school district, this factor clearly weighs in favor of MJ under established Mississippi law. There is simply no evidence in the record establishing that Lisa's home is as stable or more stable, than MJ's home.

Not a scintilla of evidence in the record establishes that MJ's home is unstable; in fact, the evidence instead supports the Chancellor's finding that MJ's home is more stable than Lisa's. The Chancellor's decision as to this factor was supported by substantial evidence. Accordingly, this assignment of error is likewise meritless.

## CONCLUSION

The Chancellor in this case properly evaluated all of the *Albright* factors in awarding physical custody of Chase Montgomery, Coleden Montgomery and Amber Montgomery to Kelly McCoy Montgomery, Jr. The Chancellor's decision is supported by substantial evidence and indeed overwhelming evidence, in the record. Accordingly, Appellee requests the Court to affirm the Chancellor's decision in all respects and assess the Appellant costs and attorneys fees herein.

RESPECTFULLY SUBMITTED, this the 11 day of Feb, 2009

  
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**CERTIFICATE OF SERVICE**

I, Jason D. Herring, one of the attorneys for the Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellee** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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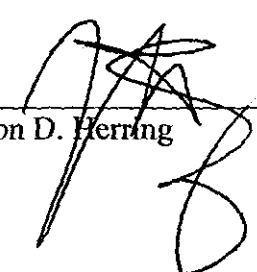
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**Hon. Jacqueline Estes Mask  
Chancery Court Judge  
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This the 11 day of Feb, 2009

\_\_\_\_\_  
Jason D. Herring



**CERTIFICATE OF FILING**

I, Jason D. Herring, attorney for the Appellee in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellee** by mailing the original of said document and three (3) copies thereof via First Class Mail, postage pre-paid, to the following:

**Ms. Betty W. Sephton  
Supreme Court Clerk  
P.O. Box 249  
Jackson, MS 38295-0248**

This the 11 day of Feb, 2009.

\_\_\_\_\_  
Jason D. Herring

