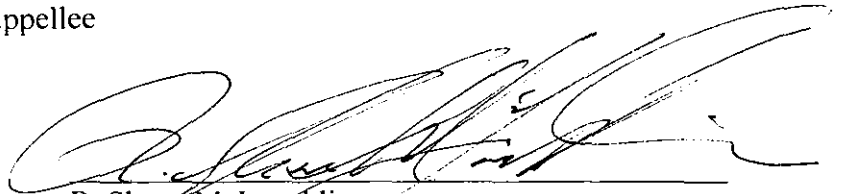


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**CERTIFICATE OF INTERESTED PERSONS**

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

1. Lisa Marie Montgomery, Appellant
2. Kelly McCoy Montgomery, Jr., Appellee
3. D. Kirk Tharp and R. Shane McLaughlin, attorneys for Appellant
4. Jason D. Herring, attorney for Appellee

A handwritten signature in black ink, appearing to read 'R. Shane McLaughlin', is written over a horizontal line.

R. Shane McLaughlin

Attorney of record for Lisa Marie Montgomery

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### **STATEMENT REGARDING ORAL ARGUMENT**

Appellant believes oral argument would be helpful to the Court to discuss the Trial Court's application of the *Albright* factors in this case and the resulting separation of siblings.

## STATEMENT OF THE ISSUES

1. Whether the Chancellor failed to properly consider the separation of the Parties' children and Lisa Marie Montgomery's child where the sibling's bond was strong and the separation had already begun to show an adverse affect on the children.

2. Whether the Chancellor erred in over emphasizing 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 age, health and sex, capacity to provide primary child care and employment responsibilities and the emotional ties of the parent and children factors favored neither party, where the children were two healthy seven and five year old males and a healthy three year old female and where Kelly McCoy Montgomery, Jr. has little time to spend with the school-aged children.

4. Whether the Chancellor abused her discretion by concluding that the continuity of care of the children, parenting skills, moral fitness and stability of home environment and employment factors favored the father where the mother was the primary care giver prior to separation, the father viewed pornography at the home and the father works during the time that the children are not in school.

### 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 26, 2006, in the Chancery Court of Pontotoc County. (C.P. p. 001-6).<sup>1</sup> Prior to trial, the Parties reached agreements as to a division of marital property consented to a divorce. (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. 055). Chancellor Mask then awarded custody of the minor children to the father, Kelly McCoy Montgomery, Jr. (C.P. p. 056).

The Opinion and Judgment of Divorce was entered on January 25, 2008. (C.P. p. 059). Lisa Marie Montgomery timely appealed the Chancellor's decision to this Court. (C.P. p. 077).

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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. 001). MJ and Lisa resided in Pontotoc, Mississippi, in a mobile home on land adjacent to MJ's parents' and extended family members' homes. (T. p. 14, 169). The mobile home had four bedrooms and two bathrooms; however, the family previously lived in a single-wide two bedroom, one bathroom mobile home for four years on the same property. (T. p. 50, 175, 218).

Lisa had a male child from a previous relationship, Christian Alexander Self, born prior to the marriage on August 6, 1998. (T. p. 132). Lisa worked on and off during the marriage. (T. p. 175-76). From June-July 2003 to September 2005, Lisa was a stay-at-home mother while MJ worked at Super Sagless, a manufacturing facility in Tupelo, Mississippi. (T. p. 176, 177). At the time of the Parties' separation, MJ worked the second shift at Super Sagless where he had been employed for approximately four years. (T. p. 40, 291). MJ's work scheduled required him to leave home at 1:30 pm to go to work, and he would arrive back home at approximately 12:00 midnight. (T. p. 22, 293). MJ generally works five days a week, but at the time of trial, he testified that he had been working six days each week. (T. p. 293).

MJ and Lisa had three (3) children during their marriage. (C.P. p. 001). Chase McCoy Montgomery was born to the marriage on December 6, 2000, Colden Bailey Montgomery was born to the marriage on December 11, 2002, and Amber Paige Montgomery was born to the marriage on April 9, 2004. (T. p. 131). MJ worked varying shifts at different jobs during the marriage. (T. p. 227-8).

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<sup>2</sup> Kelly McCoy Montgomery, Jr. is referred to by his nickname, "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.

Prior to the separation, Lisa was working at Everwood Products in Pontotoc and her work hours were from 6:00 am until 4:30 pm. (T. p. 150). At the time, MJ worked from 5:00 or 6:00 am until 2:30 pm. (T. p. 149). Once at home, MJ would sit in a recliner and watch television or play video games while Lisa cared for the children. (T. p. 205, 403). Once Lisa got off of work, she would pick up the kids from her sister's house, cook supper, bathe the children and get them ready for bed. (T. p. 150). Lisa's sister provided daycare for the children prior to their separation and in the beginning of the separation. (T. p. 192, 194). Lisa primarily provided the parenting responsibilities during the marriage. (T. p. 217, 318, 422). At trial, MJ agreed that Lisa even provided the main parenting responsibilities while they were visiting in relatives' homes and primarily cleaned the home. (T. p. 328, 354). MJ's mother testified that prior to the separation she observed both parents discipline the children and read and go through educational activities with the children. (T. p. 36). Lisa's father believed through his observations of both parents that Lisa was the primary caregiver prior to their separation. (T. p. 389). Lisa currently helps Christian with his homework and provides the primary child care responsibilities for him. (T. p. 221). Lisa has very strong emotional ties with the children and the children are very attached to their mother. (T. p. 426).

During the marriage, MJ would view pornography on the internet or on video in the home while the children were present. (T. p. 232, 234-5). Lisa testified that MJ would be on the internet from the time he got home until after dark. (*Id.*). At one point during the marriage, the children found a movie they wanted to watch, but when Lisa put the movie in the player, it was a pornographic video in a child's video case. (T. p. 235). The children were not exposed to it because Lisa was blocking their view of the television. (*Id.*). Additionally, MJ admitted to downloading Paris Hilton's sex video from the Internet to view. (T. p. 236).

The Parties separated on May 15, 2006. (T. p. 119). Lisa began having an affair with Joe Betancourt, a man she met at work, just prior to her separation from MJ. (T. p. 46, 402, 432, 434, 437). At the time of trial, Lisa was not seeing Mr. Betancourt, but she had a relationship with William Earl Hill, Jr. (T. p. 138). Lisa has not had overnight guests during the presence of the children. (T. p. 138-9).

Initially, Lisa cared for the children every other night while MJ was working after they separated. (T. p. 65, 193). She fed them, played with them, bathed them and got them ready for bed during this time. (T. p. 202). However, this ended after an altercation between Lisa and MJ's mother concerning some of Lisa and MJ's tax documents. (T. p. 132). Since the separation and altercation, Lisa calls to talk to the children every night since she is unable to see them. (T. p. 78, 132). At the time of trial, MJ's mother assisted MJ a great deal in caring for and raising the children. (T. p. 22). MJ's mother is not employed and was diagnosed as being bipolar in 1999. (T. p. 52-3). Lisa stated that the bipolar disorder makes MJ's mother tired and, as a result, she seemed to sleep a lot. (T. p. 198). MJ's mother goes to MJ's house at 1:30 pm so he can leave for work. (*Id.*). Once MJ gets home between 11:40 pm and midnight, she goes to her own home. (*Id.*). MJ's mother helps the children with their homework, prepares their supper, bathes them and puts them to bed. (*Id.*). During this time, MJ is available only by telephone at 6:00 pm and 9:00 pm. (*Id.*). MJ's mother puts the children to bed between 8:30 pm and 9:30 pm while MJ is at work. (T. p. 57-8).

MJ's mother testified that she spends more time with the children when they are awake than MJ is able to spend with them because of his work hours. (T. p. 114). MJ gets up at 7:00 am to help Chase get ready for school. (T. p. 122). Chase is picked up by the bus around 7:30

am. (T. p. 288). While MJ has had physical custody of the children, his mother has been their primary caregiver. (T. p. 144, 221).

At the time of trial, Chase was in school at South Pontotoc Schools. (T. p. 29). The evidence showed that he was performing well there. (*Id.*). Chase would have to transfer to the North Pontotoc School District if Lisa received primary physical custody of the children. (*Id.*). Chase's half-brother Christian attends North Pontotoc Schools. (T. p. 156). Chase and Christian would ride the school bus together if Lisa received primary physical custody. (T. p. 155-6). Currently, Christian rode the bus in the mornings and evenings to and from school. (*Id.*). Lisa's sister watches him for twenty minutes in the mornings while he is waiting on the bus, but Lisa is there in the afternoons when he gets off the bus. (*Id.*). Colden Bailey was in preschool two days each week at the time of the trial. (T. p. 26, 28). MJ's mother took Colden Bailey to his first day of preschool. (*Id.*). Chase rides the bus to school and MJ's mother takes Colden Bailey to school. (T. p. 25). Amber was not yet of school age at the time of the trial. (T. p. 28).

Prior to the separation, the children were not involved in any social activities. (T. p. 153). Now, the children are involved in some church activities and Chase is in Cub Scouts; however, MJ's mother primarily takes them to these activities, but their grandmother or uncle may take them to some Church activities. (T. p. 27, 77). MJ's mother also assists in taking the children to the doctor when MJ is unable to do so. (*Id.*). Prior to the separation, Lisa took the children to the doctor. (T. p. 151). MJ occasionally takes the children to church at Fairview Methodist or Charity Baptist Church. (T. p. 48). Lisa was, at the time of trial, seeking a home church that included children's activities. (T. p. 179-80, 276).

Importantly, Chase and Christian, Lisa's son prior to her marriage to MJ, have a very close sibling relationship. (T. p. 66). Even MJ's mother testified that Chase "adores" Christian

and that it has been difficult on Chase since they were separated from one another. (*Id.*). According to Lisa, one of the major problems with MJ having custody is the separation of the siblings. (T. p. 177). The children have a significant bond with their older half-brother, Christian. (T. p. 178, 190). Lisa's father stated that the children have good relationships and that they all miss each other since being separated. (T. p. 387). Lisa's mother stated that the "children were raised together as an individual family. They've never been separated until now, and it's been pretty traumatic on all of them." (T. p. 419).

MJ's sister is addicted to prescription drugs and would occasionally come to his home for money from their mother. (T. p. 87-8). MJ's mother has allowed the children to be exposed to the sister when she was seeking money. (T. p. 90).

Since the separation, Lisa has lived at three different locations. (T. p. 171) She first moved to a home about five minutes from her children. (T. p. 148). She subsequently moved in with her sister. (*Id.*). She currently lives in Thaxton, Mississippi at the dead-end of a paved road in a two bedroom, two bathroom home adjacent to her parents' and sister's homes. (T. p. 155, 172, 174). Her sister and parents are willing and able to assist Lisa, if she needs help with the children. (T. p. 219). At the time of the trial, Lisa was working in Ecu, Mississippi. (T. p. 154). Her work hours are from 7:00 am until 3:30 pm, Monday through Friday. (T. p. 154-5).

Following the three-day trial, which consisted of the testimony of five (5) witnesses, the trial court rendered its decision. (C.P. p. 055, T. p. 2-3). The trial court concluded that it was in the best interests of the minor children for the father, Kelly McCoy Montgomery, Jr., to have physical custody of the children. (C.P. p. 056). The Court awarded Lisa Marie Montgomery reasonable visitation and ordered her to pay child support. (C.P. p. 056, 058).

Lisa has appealed the Chancellor's ruling to this Court. As discussed below, the Chancellor's analysis of the *Albright* factors was incorrect, and was an abuse of discretion. Accordingly, the Chancellor's decision should be reversed.

### **STANDARD OF REVIEW**

The scope of review of a Chancellor's custody determination is whether the Chancellor abused his discretion, was manifestly wrong or clearly erroneous 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.

*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. However, where a chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Brekeen v. Brekeen*, 880 So. 2d 280, 283 (Miss. 2004).

In this case, the Chancellor improperly analyzed the *Albright* factors and placed too much weight on some factors and no weight on other factors. The decision is unsupported by evidence

in the record and the Chancellor abused her discretion. Accordingly, the Court should reverse the Chancellor's custody determination.

### **SUMMARY OF THE ARGUMENTS**

The Chancellor failed to properly analyze or consider the children's separation from their half-sibling, Christian. The evidence demonstrated that the children had a strong relationship with their half-sibling and separation had already been "traumatic" on them as of the time of trial. The Chancellor failed to consider the separation of the siblings in this case.

Next, the Chancellor failed to properly analyze each of the applicable *Albright* factors by providing too much weight to some factors and little or no weight to other factors. The Chancellor erred in determining that the age, health and sex of the children, capacity to provide primary child care and employment responsibilities and the emotional ties of the parent and children factors were neutral. The Chancellor also erred in finding the continuity of care, parenting skills, moral fitness, and stability of home environment and employment of each parent factors favored MJ. Most of these factors should have favored Lisa. The Chancellor improperly found that none of the *Albright* factors weighed in favor of Lisa. The evidence showed that, among other vital points, Lisa had a strong extensive family unit that was willing to assist her in caring for the children; Lisa had an employment schedule that allowed her to be with the children far more than MJ could; Lisa had provided primary care prior to the separation; Lisa had better parenting skills and a closer bond with the children. Also, the trial court should have considered the tender years doctrine in analyzing the age, health and sex of the children factor.

The Chancellor erred in weighing Lisa's affair too heavily against her throughout the *Albright* analysis and in not considering MJ's use of pornography at the home when evaluating the moral fitness factor. There was no evidence that Lisa's affair caused a detrimental effect on

the children. There was evidence that MJ's use of pornography nearly exposed the children to extremely inappropriate material.

Next, the evidence showed the MJ, due to his work schedule, only spent thirty minutes each day with Chase and with Colden on the two days he went to daycare. MJ's mother actually spent more time with Chase and, as a result, had become his primary caregiver during the Parties' separation. MJ was also required to work some Saturdays whereas Lisa was not. Lisa simply has more time to care for the children, is willing to provide them with the care they need, has the parenting skills necessary to raise the children. Along with the analysis of the other factors, Lisa should have been awarded custody.

The Chancellor incorrectly applied the *Albright* factors in determining the best interests of the minor children, and improperly awarded custody to Kelly McCoy Montgomery, Jr. The Chancellor failed to properly weigh the evidence and weighed Lisa's affair too heavily against her. Accordingly, the Chancellor's decision should be reversed.



## ARGUMENT I.

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

The separation of siblings should be considered in evaluating the polestar consideration of the best interests of the minor child. *See, e.g., Albright*, 437 So. 2d at 1005; *Bowen v. Bowen*, 688 So. 2d 1374, 1380 (Miss. 1997). Maintaining 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 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). However, Chancellors “should in all cases attempt, insofar as possible, to keep the children together in a family unit.” *Mixon v. Bullard*, 217 So. 2d 28, 30 (Miss. 1968) (cited by *Sparkman v. Sparkman*, 441 So. 2d 1361, 1362 (Miss. 1983)). The *Sparkman* Court stated that there is a “common sense recognition of the ordinary facts of life, that in the absence of some unusual and compelling circumstance dictating otherwise, it is not in the best interest of children to be separated.” *Sparkman*, 441 So. 2d at 1363. Relying on *Sparkman*, the Court of Appeals affirmed a Chancellor’s award of custody that would keep the siblings in one family unit because it “would be improper to separate the three children.” *Massey v. Huggins*, 799 So. 2d 902, 907 (Miss. Ct. App. 2001).

The Trial Court recognized a preference for keeping siblings together whenever possible. (C.P. p. 074). The Trial Court merely recited that Christian, Lisa’s nine-year old child from a different relationship, lives with her and that the Parties’ children have had a relationship with Christian. (*Id.*). The Chancellor then went on to split the children, without explaining the

rationale overcoming the preference or giving consideration to the traumatic effect of separating the children. (*Id.*).

It appears from the Chancellor's opinion that no weight was given to the Mississippi Supreme Court's and Court of Appeals' previous rulings regarding separating siblings. In *Mixon*, the Court not only said that Chancellors should consider the separation of the siblings, but the Court stated that in all cases possible, Chancellors should keep the family together. However, the Chancellor here noted in passing that awarding custody to MJ would separate the siblings and did not afford any weight or consideration to the effect of their separation. There was no unusual and compelling circumstance directing the Chancellor to separate these children. Therefore, it was in the best interest of the children to remain together.

The Chancellor should have followed the Courts' previous rulings in *Mixon*, *Sparkman* and *Massey* for guidance on the issue of separating the siblings. The Chancellor committed error in deciding to separate the siblings. The Trial Court's decision was in error and should be reversed.

## **ARGUMENT II.**

### **THE CHANCELLOR FAILED TO PROPERLY ANALYZE THE ALBRIGHT FACTORS AND OVEREMPHASIZED LISA MARIE MONTGOMERY'S ADULTEROUS AFFAIR.**

Of course, the polestar consideration in making a custody determination is the best interests of the children. *Albright*, 437 So. 2d at 1005. The Court in *Albright* set out several factors which should be considered in determining the children's best interest. *Albright*, 437 So. 2d at 1005. However, "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).

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). One party’s adultery alone does not disqualify that parent from custodianship. *Carr v. Carr*, 480 So. 2d 1120, 1121 (Miss. 1985). In *Carr*, the chancellor found that both parents were fit to have custody and awarded custody to the father due to the mother’s adultery. *Carr*, 480 So. 2d at 1121. The primary guide in custody actions is the best interest rule, not marital fault. *Id.* at 1122. A chancellor weighs one party’s adulterous conduct in the moral fitness factor of the *Albright* analysis, but this is only one factor of the complete analysis. *Id.* at 1123. The trial court should consider whether that parent’s adultery had any effect on the minor child. *Id.* Special or exceptional circumstances may exist to grant custody to a parent that has committed adultery. *Id.* The Mississippi Supreme Court in *Carr* held that the chancellor had not made reversible error in considering the mother’s adultery in the custody award to the father. *Id.*

The Mississippi Supreme Court in *Brekeen* held that the chancellor relied too heavily on the mother’s adultery in awarding custody to the father. *Brekeen v. Brekeen*, 880 So. 2d 280, 286 (Miss. 2004). Chancellors should not place too much weight on one *Albright* factor. *Brekeen*, 880 So. 2d at 286. The Court reversed, holding that the “chancellor abused his discretion by placing too much weight upon the moral fitness factor and disregarding evidence presented under the remaining factors.” *Id.* at 287. Adulterous behavior should only be considered in the moral fitness factor. *Id.*

The Chancellor in this case found that none of the *Albright* factors favored Lisa Marie Montgomery. All of the factors were either neutral or favored Kelly McCoy Montgomery, Jr. The Chancellor failed to properly analyze and consider each factor and placed too much weight on Lisa's affair. In her *Albright* analysis, the Chancellor discussed Lisa's affair in the parenting skills factor and the moral fitness factor. (C.P. p. 069, 071). In the analysis of the parenting skills factor, the Chancellor stated:

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," whom she described as a Latino and whom she believes has now returned to Mexico.

(C.P. p.069-70). In considering the Parties' moral fitness, the Chancellor discussed Lisa's affair again and stated:

The parties' moral fitness was chiefly assailed by means of Lisa's extra-marital relationship. She acknowledged that her desire to pursue a relationship with "Joe" affected her having custody of her children, and that she currently has another boyfriend.

(C.P. p. 072).

In each custody case, the *Albright* factors are considered based on the evidence presented at trial. The factors assist the chancellor in determining the best interest of the minor children. Even though a chancellor can weigh a parent's adulterous behavior, the Chancellor cannot sanction the parent for the affair in awarding custody. The Chancellor here sanctioned Lisa for her affair in awarding custody to MJ.

According to *Carr* and *Brekeen*, chancellors should consider adulterous behavior only in the moral fitness factor and should not place any more weight on this factor than any other factor. The Chancellor here improperly considered Lisa's affair in two of the *Albright* factors and, thus, placed far too much weight on it. The Chancellor also did not consider MJ's

pornography use, and the children's near-exposure to pornographic materials, in the *Albright* analysis.

There was no evidence during trial that Lisa's affair had any effect on the minor children other than causing the parents' separation. The Chancellor did not consider the effect of the affair or lack thereof. This failure is likewise improper.

Finally, special or exceptional circumstances are not required to place a minor child with a parent who committed adultery, but may be a reason for doing so. There exist special or exceptional circumstances here. Lisa's work schedule is far more favorable for caring for the children than MJ's schedule. As discussed throughout, there are days when MJ sees Chase only thirty minutes a day since he works from 1:30 pm to 12:00 midnight. Also, MJ works some Saturdays when Lisa does not. The children need a parent to provide certain needs such as assisting them with homework, preparing their evening meals, bathing them, getting them ready for bed, taking them to social activities. A parent who is only able to spend thirty minutes daily with a child cannot provide these important care-giving responsibilities. MJ's schedule is not one that is feasible for full custody of the children. However, Lisa's schedule is and she should have been awarded primary physical custody.

The Chancellor erred in analyzing the *Albright* factors and placed too much weight on Lisa's affair. The Chancellor's decision must be viewed as sanctioning Lisa for the affair, since nothing else justified MJ being awarded custody. Further, the Chancellor applied the wrong legal standard by considering Lisa's affair in both parenting skills factor and moral fitness factor. Moreover, the Chancellor failed to consider MJ's pornography use in the moral fitness factor.

The Chancellor's decision should be reversed on these grounds.

### ARGUMENT III.

**THE CHANCELLOR ABUSED HER DISCRETION BY CONCLUDING THAT THE AGE, HEALTH AND SEX OF THE CHILDREN, CAPACITY TO PROVIDE PRIMARY CHILD CARE AND EMPLOYMENT RESPONSIBILITIES AND THE EMOTIONAL TIES OF THE PARENT AND CHILDREN FACTORS WERE NEUTRAL.**

#### I. Age, Health and Sex Factor

The Chancellor's decision was incorrect and an abuse of discretion as to the age, health and sex of the children, capacity to provide primary child care and employment responsibilities and the 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 in favor of MJ for the male children and Lisa for the female child. Lisa contends that she should have been given an advantage as to this factor pursuant to the "tender years" doctrine.

The tender years doctrine is a presumption that the mother is better suited to care for younger children based upon their needs. *Mercier v. Mercier*, 717 So. 2d 304, 306-7 (Miss. 1998). Under Mississippi law, the age of a child is simply one of the factors that is considered in determining the best interests of the child. *See, e.g., Albright*, 437 So. 2d 1005. To abandon the tender years rule, however, "would discard a factor worthy of weight in determining the best interest of a child in a particular case." *Id.* The polestar consideration in custody matters is the best interest and welfare of the child, and the *Albright* factors are to be employed in the furtherance of that determination. *Id.* The Mississippi Supreme Court has held that a child is still in its "tender years" when that child is under the age of seven. *Mercier v. Mercier*, 717 So. 2d at 307. The Court of Appeals has stated that "there is still a presumption that a mother is generally better suited to raise a young child." *Passmore v. Passmore*, 820 So. 2d 747, 750 (Miss. Ct. App. 2002) (citing *Hollon v. Hollon*, 784 So. 2d 943, 947 (Miss. 2001)). "In essence,

while the father no longer has to prove the mother unfit to rebut the automatic application of the tender years presumption, our courts have determined that along with the rest of the *Albright* factors, the tender years doctrine is 'a factor worthy of weight in determining the best interest of a child.'" *Id.*

The two male children were seven and five years old and the female child was only three years old at the time of the Chancellor's decision. (C.P. p. 068). None of the children had any health problems. (*Id.*). The Court found that MJ was slightly favored as to the male children and Lisa was slightly favored as to Amber, the female child. (*Id.*). Other than mentioning that the Court of Appeals, in *Brewer v. Brewer*, 919 So. 2d 135 (Miss. Ct. App. 2005) which affirmed a custody decision awarding a four year old daughter to the father, the Chancellor did not mention the tender year's issue in the analysis of this factor. (*Id.*). The Chancellor did not consider the tender years doctrine in her analysis. The Chancellor should have at least considered that Colden Bailey and Amber were both children in their tender years and their needs would have been better met by their mother. Both children were under the age of seven and Amber was only three. In considering the tender years of the children, the Chancellor should have found that this factor favored Lisa instead of being neutral.

Considering the age, health and sex factors together, the Chancellor was incorrect in concluding that this factor was neutral and in not considering the tender years doctrine. Even though the tender years doctrine has been weakened by the courts, it is still a factor that the Chancellor should have considered in determining the best interest of the children in this case. The Chancellor erred by finding that this factor was not in favor of Lisa.

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

The Chancellor abused her discretion in finding the capacity to provide primary child care and employment responsibilities factor neutral.

This factor of *Albright* properly favors a party who has a flexible work schedule, and is therefore able to provide primary care to the child. *Rinehart v. Barnes*, 819 So. 2d 564, 566-567 (Miss. Ct. App. 2002). The Court of Appeals has stated that one parent's work schedule that allows more time to be spent with the children would weigh more heavily for that parent on the capacity to provide primary child care and employment responsibilities factor. *Massey v. Huggins*, 799 So. 2d 902 (Miss. Ct. App. 2001). In *Ivy*, the Court stated that when the proof showed that one parent worked extended hours that would prevent him from devoting time to the children, the capacity to provide primary child care and employment responsibilities factor would weigh toward the other parent. *Ivy v. Ivy*, 863 So. 2d 1010, 1014 (Miss. Ct. App. 2004). In *Moak*, a father's unconventional work schedule weighed toward the mother in awarding custody. *Moak v. Moak*, 631 So. 2d 196, 198 (Miss. 1994). Further, the fact that one parent's employment is closer to the party's home may likewise properly result in an advantage as to this *Albright* factor. *Lee v. Lee*, 798 So. 2d 1284, 1290 (Miss. 2001). 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).

The Chancellor found that this factor favored neither party, despite the fact that MJ's work schedule precluded much contact with two of the children. (C.P. p. 070). The Chancellor erred in finding this factor neutral.

This factor should have favored Lisa for several reasons. First, MJ's work schedule only allows him a few moments during the morning hours prior to school with Chase and the same



amount of time with Colden on the days that he attends daycare. MJ's schedule requires him to leave the home before Chase gets home from school and arrive home after Chase is in bed for the evening. Due to his employment obligations, MJ has only thirty minutes to spend with Chase on a daily basis and uses this time to get him ready for school and on the school bus. MJ's mother cares for the children at night while he is at work and has essentially become the children's primary caregiver.

Lisa, on the other hand, works a conventional schedule and would be at home with the children in the evenings. She would be able to get them off the bus, pick up Amber and Colden from daycare, assist them with homework or other extracurricular or social activities, feed them, bathe them and get them ready for bed. Currently, MJ's mother provides these care-giving responsibilities for the children. Since MJ spends basically no time with Chase and very little time with Colden on the days that he goes to daycare, this factor favors Lisa.

Secondly, the evidence during the trial showed that Lisa does not have to work Saturdays and MJ often does, which requires his mother to care for the children. Lisa would be able to care for the children on every Saturday that MJ did not have visitation with them if she were awarded primary physical custody. For this reason, this factor should favor Lisa.

Further, Lisa's employment is very near her house and MJ has to travel several miles to his employment daily. Although MJ does not have a highly lengthy commute, his commute to and from work takes even more time away from the already-limited time he has for the children whereas, Lisa essentially has no commute. Lisa should have been favored since her work schedule allows for much more time with the children, in addition for her far shorter commute to her job.

For a myriad of reasons, the Chancellor should have found that this factor favored Lisa rather than finding that it favored neither parent. Simply put, the Chancellor failed to appreciate that MJ's work schedule essentially precluded him from spending appreciable time with the children daily. Lisa's schedule provided for far more time with the children.

As the Chancellor's decision as to this factor is unsupported by substantial evidence, the Chancellor's decision must be reversed in this regard.

#### **ARGUMENT IV.**

**THE CHANCELLOR IMPROPERLY CONCLUDED THAT THE CONTINUITY OF CARE OF THE CHILDREN PRIOR TO SEPARATION, PARENTING SKILLS, MORAL FITNESS AND STABILITY OF HOME ENVIRONMENT AND EMPLOYMENT OF EACH PARENT FACTORS FAVORED KELLY MCCOY MONTGOMERY, JR.**

##### **1. Continuity of Care Factor.**

The Chancellor's decision was incorrect and an abuse of discretion as to the continuity of care of the children prior to separation. The Chancellor erred in finding that the continuity of care factor favored MJ.

Although *Albright* phrased this factor as "continuing care prior to separation," both care before and after separation should be considered. See *Caswell v. Caswell*, 763 So. 2d 890, 893 (Miss. Ct. App. 2000). To determine who has been a child's primary caretaker Courts consider facts such as who bathed the child, put the child to bed, prepared meals, arranged social activities, handled medical care and clothing purchases, played with the child, *et cetera*. See, e.g., *Watts v. Watts*, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). See also BELL, *supra*, § 5.03(3) (collecting authorities). The continuity of care factor may be neutral where the parties shared custody during separation. See *Horn v. Horn*, 909 So. 2d 1151, 1159. In *Brekeen*, both parents participated in the care of the child, the mother did not work when the child was younger, and

therefore was able to participate more in the care of the child, while the father worked on a full-time basis; therefore, this factor favored the mother. *Brekeen v. Brekeen*, 880 So. 2d 280, 284 (Miss. 2004). Chancellors should consider whether a third party may be the actual primary caregiver. *Divers v. Divers*, 856 So. 2d 370, 374 (Miss. Ct. App. 2003). In *Divers*, the Court of Appeals stated that this factor would favor the father's parents since neither the mother nor the father provided continuous care for the child. *Divers*, 856 So. 2d at 374.

The Chancellor stated that MJ has had temporary custody of the children during the parents' separation and that he has been the primary caregiver under the analysis of this factor. (C.P. p. 069). The Chancellor acknowledged that she could consider the care provided to the children after the parents' separation. (*Id.*). However, the Chancellor failed to consider the primary caregiver prior to the separation. The Chancellor, accordingly, found that "this factor slightly favors MJ." (*Id.*).

Both care before and after the separation should have been considered and weighed by the Chancellor. Prior to the separation, Lisa was unquestionably the children's primary caregiver. After work, she picked the kids up from daycare, took them, read or provided other educational activities, fed them, played with them, bathed them and put them to bed. Lisa also primarily handled their medical care and purchased some of their clothing. She was their primary caregiver at relatives' homes while the family was visiting them. The testimony from MJ, Lisa and her parents was that she was the primary caregiver. MJ's mother also testified that she observed Lisa providing these tasks for the children. Significantly, Lisa also stayed at home with the children for two years of the eight year marriage. During this time Lisa was able to participate even more in the care of the children than she was before. Clearly Lisa was the primary caregiver prior to the parents' separation.

The testimony revealed that after the separation that MJ's mother spent more time with the children than MJ does because of his work responsibilities and unconventional work schedule. MJ, his mother and Lisa all testified that currently MJ's mother, not MJ, is the primary person who bathes the children, puts them to bed, prepares their evening meal, and assists with homework. MJ's mother also frequently takes the children to social activities and for medical care. Importantly, MJ's mother spends more "awake hours" with the children than MJ because he is at work during much of the day.

Lisa is able and willing to provide these parenting responsibilities that MJ's mother currently provides. In fact, Lisa currently provides these responsibilities for her other child, Christian. However, MJ is unable to provide these responsibilities due to his work schedule. Additionally, Lisa provided these parenting responsibilities to the children prior to the separation.

The Chancellor erred in relying solely on primary care after separation. The Chancellor should have considered that Lisa was the children's primary caregiver prior to the separation. Accordingly, the Chancellor erred in finding that this factor favored MJ.

## 2. Parenting Skills.

In determining which parent has the most ideal parenting skills, a chancellor should look to the "parent's ability to provide physical care, emotional support, discipline and guidance." See *BELL*, supra, § 5.03[4]. One parent will be favored when the other fails to supervise or protect a child from danger. See *Passmore v. Passmore*, 820 So. 2d 747, 751-52 (Miss. Ct. App. 2002); *Mosley v. Mosley*, 784 So. 2d 901, 907 (Miss. 2001). Where one parent provides a cleaner home, balanced meals for the child, and was taking the time to get the child ready for bed

and school in the mornings, that parent is favored in the parenting skills factor analysis. *Pacheco v. Pacheco*, 770 So. 2d 1007, 1010 (Miss. Ct. App. 2000).

The Chancellor found that prior to the separation that neither parent established a more prominent role than the other in regards to this factor. (C.P. p. 069). The Chancellor determined that MJ “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.” (*Id.*). The Chancellor also weighed the fact that the separation was caused by “Lisa’s desire to pursue a romantic relationship with “Joe,” whom she described as a Latino and whom she believes has now returned to Mexico.” (C.P. p. 69-70). In considering the testimony, and in yet-again considering the extra-marital affair, the Court found that this factor slightly favored MJ. (C.P. p. 70).

The Chancellor should have found that the parenting skills factor favored Lisa instead of MJ. Lisa’s history of being the primary caregiver and providing the parenting responsibilities to care for her other child Christian shows that she has the parenting skills necessary for caring for the children. Further, the evidence at trial showed that Lisa was able to prevent the children from being exposed to MJ’s pornographic videotape.

Additionally, as argued previously, the Court improperly weighed Lisa’s affair against her in the *Albright* analysis. The Chancellor should not have considered the affair under the parenting skills factor. Adulterous behavior has nothing to do with the ability of one parent to provide adequate or superior parenting skills. The Court erred by twice considering the affair, and the Court’s decision therefore amounted to sanctioning Lisa for the affair.

The Chancellor's decision should be reversed as Lisa should be favored under the analysis of this factor.

### 3. Moral Fitness.

The Chancellor afforded too much weight to the moral fitness factor in this case. The Chancellor found that it favored MJ due to Lisa's adultery, but failed to consider the moral fitness flaws of MJ.

"Moral fitness of a parent encompasses the charge of adultery. But moral fitness is but one factor to be considered, and it is a factor worthy of weight in determining the best interest of the child. Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, but on the other hand, may have no effect. The trial court should consider this factor along with all others when making original custody determinations." *Brekeen v. Brekeen*, 880 So. 2d 280, 284 (Miss. 2004). In *Brekeen*, the Court reversed the trial court, stating that the chancellor abused his discretion by placing too much weight upon the moral fitness factor and the mother's adultery. *Brekeen*, 880 So. 2d at 287. "The fact of adultery alone does not disqualify a parent from custodianship but that the polestar consideration in original custody determinations is the best interest and welfare of the minor child." *Carr v. Carr*, 480 So. 2d 1120, 1121 (Miss. 1985). Marital fault should not be used as a sanction in custody awards. *Albright*, 437 So. 2d at 1005. The Mississippi Court of Appeals has recognized that it may be in the best interest of a child to remain with its mother even though she may have committed adultery. *McCraw v. McCraw*, 841 So. 2d 1181, 1184 (Miss. Ct. App. 2003). Chancellors should review whether an affair has had a detrimental effect on the children. *McCraw*, 841 So. 2d at 1184.

The Chancellor stated that she afforded this factor no greater weight than any other factor. (C.P. p. 072). Lisa admitted to having an affair and a boyfriend at the time of the trial. (*Id.*). The Chancellor found that this factor weighed in favor of MJ after considering Lisa's affair and the fact that she had a different boyfriend at the time of trial. (*Id.*). However, it appears by the Court's lack of discussing MJ's use of pornography in its Opinion that this was not considered at all by the Court in analyzing this factor.

Lisa admitted that she was romantically involved with Joe Betancourt and later with William Earl Hill, Jr. The Parties were not divorced on grounds of adultery, but were awarded a divorce based upon irreconcilable differences. (C.P. p. 055). The evidence at trial showed that MJ viewed pornography on the internet and on videotapes. MJ admitted to viewing pornography and even downloading a video from the internet. All of these acts and his pornography viewing occurred at the home, at times while the children were present. Further, MJ left one of his pornographic videos in a children's video case. Obviously, this carelessness could have a considerable detrimental effect on the children.

There was no evidence at trial showing that Lisa's adultery had a detrimental effect on the children. Of course, it had a detrimental effect on the Parties' marriage; however, Lisa should not be punished for this in the custody analysis. Mississippi courts have long held that marital fault cannot be used as a sanction in custody awards. Nevertheless, the Chancellor did not consider MJ's moral fitness flaws and placed too much weight on Lisa's adultery.

The Chancellor erred by inappropriately applying the legal standard by placing too much weight on the moral fitness factor. The Chancellor's decision in this respect should be reversed.

#### 4. Stability of Home Environment and Employment of Each Parent.

The Chancellor erred in finding that the stability of home environment and employment of each parent favored MJ.

In evaluating this *Albright* factor, Courts look to facts such as stable household routines, the stability of relationships and proximity to extended family. See BELL, supra, § 5.03(1). A Court may also consider the stability of the child's needs being met, and the provision of religious and social activities in evaluating overall stability. See, e.g., *Dearman v. Dearman*, 811 So. 2d 308, 311 (Miss. Ct. App. 2001); *Pacheo*, 770 So. 2d at 1010. "Attributes that contribute to a positive rating on this factor include household routines and activities, location, household composition and the stability of those relationships, personal habits of the parent and other household members, and proximity to extended family." See BELL, supra, § 5.03[11]. The presence of relatives living near one parent would favor that parent in this analysis. *Neville v. Neville*, 734 So. 2d 352, 355 (Miss. Ct. App. 1999). Parental conduct, such as pornography use, may negatively affect the home environment. *Brown v. White*, 875 So. 2d 1116 (Miss. Ct. App. 2004). Exposure to pornographic video tapes while in the custody of the mother was weighed in the *Albright* analysis in determining the best interest of the child. *Brown*, 875 So. 2d at 1119.

The Chancellor found that the stability of the home environment and employment of each parent factor slightly favored MJ. (C.P. p. 74). MJ's home is larger than Lisa's and Lisa has Christian, her other child, living with her. (C.P. p. 73). The Chancellor, in her opinion, relied heavily on the sizes of the parents' respective homes in deciding that MJ was favored. (C.P. p. 73-74).

Lisa's home is adjacent to her parents and sister who support Lisa and are willing to assist her with the children if needed. Further, Lisa's other child has a close relationship with the



Parties' children. If Lisa obtained custody, all of the children would be reunited and would ride the school bus together, thus strengthening their bond. Additionally, Lisa would be able to provide the children with a stable home environment. She would be able to assist them in the afternoons with their homework, prepare their evening meals, take them to evening social activities, bathe them and put them to bed. It is far superior for a parent to complete these routines than another person. Lisa would be able to provide stable routines for the children.

Further, Lisa does not have to work on Saturdays whereas MJ does. In fact, MJ was working Saturdays at the time of trial. When he works Saturdays, he spends only thirty minutes with the school-aged children each weekday, Saturday from the time the children get up until 1:30 pm when he leaves for work and on Sunday. If it is Lisa's weekend to visit with the children, MJ only spends thirty minutes with the school-aged children each weekday and Sunday evenings when Lisa returns the children to MJ. Obviously this is not a stable, ideal home environment for the children.

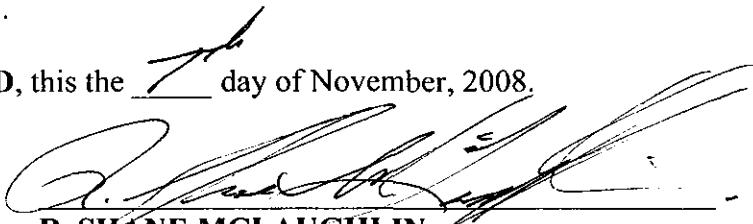
MJ has set up a routine whereby his mother cares for the children and creates household routines. MJ also lives in close proximity to his relatives and they have agreed to support him and the children. However, MJ's admitted use of pornography negatively impacts his home environment and should weigh against him on the analysis of this factor. The potential for the children's exposure to pornography negatively effects the stability of MJ's home environment.

Therefore, the Chancellor erred in finding that this factor favored MJ. The Chancellor failed to consider the detrimental effect that MJ's pornography use has on the children and relied too heavily on the size of Lisa's home. Further, the Chancellor did not consider that Lisa could provide a stable home environment due to her employment schedule.

## CONCLUSION

The Chancellor in this case improperly evaluated many of the *Albright* factors in awarding custody of the children to Kelly McCoy Montgomery, Jr. The Chancellor improperly relied too heavily on Lisa's adultery and sanctioned her for this behavior. The Chancellor erred in finding that the age, health and sex of the children, capacity to provide primary child care and employment responsibilities and the emotional ties of the parent and children factors were neutral. Further, the following factors should have been in favor of Lisa instead of MJ: continuity of care, parenting skills, moral fitness, and stability of home environment and employment of each parent. Additionally, the Chancellor did not consider and weigh the separation of the siblings in awarding custody to MJ. The Chancellor's decision is unsupported by evidence sufficient to affirm it. Accordingly, Appellant Lisa Marie Montgomery requests the Court to reverse the Chancellor's decision.

RESPECTFULLY SUBMITTED, this the 14 day of November, 2008.

  
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**CERTIFICATE OF SERVICE**


I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** 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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This the   7   day of November, 2008.

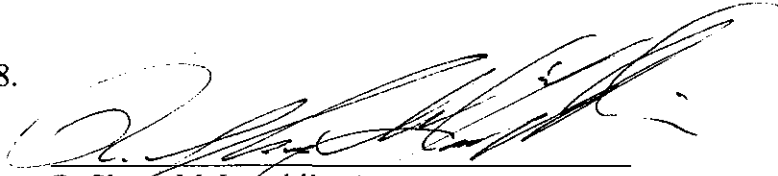
  
R. Shane McLaughlin

**CERTIFICATE OF FILING**

I, R. Shane McLaughlin, attorney for the Appellant 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 Appellant** 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 7<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
R. Shane McLaughlin