BRIEF OF APPELLANT 2008-CA-01181-SCT

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or refusal:

1. John Patrick Benal, Plaintiff-Appellant;
2. Angela Jean Benal; Appellee;
3. E. Michael Marks and Julie Ann Epps, counsel for Appellant on appeal;
4. E. Michael Marks, counsel for Appellant at trial;
5. F. Andrew Howell, counsel for Appellee at trial and on appeal;
6. Cynthia Brewer, Chancellor

This, the 20th day of January, 2009.

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

(i) Course of the Proceedings and Dispositions in the Court Below:

John Patrick Benal and Angela Jean Benal were married on March 23, 1991, in Nebraska. RE 2. Three children were born to the marriage: Sarah was fourteen years old at the time of the hearing with a date of birth of August 26, 1993. Katherine was eleven years old having been born on October 14, 1996. Erin was eight with a date of birth of April 4, 2000. RE 3.

In April of 2007, John moved to Madison County, Mississippi as a result of obtaining a position as Project Manager with Cellular South in Ridgeland, Mississippi, at a higher salary than he had ever made before—about $6,000.00 gross a month. R.II/11, 26, C.P. 21. Angela followed with the three children in the summer of 2007 after the children had completed the school year in Nebraska. RE 2, R.II/11. John filed for a divorce in the Chancery Court of Madison County on December 26, 2007 alleging habitual cruel and inhuman treatment and irreconcilable differences. C.P. 1

As soon as she was served with the complaint, Angela took the children back to Nebraska and filed for a divorce there. The Nebraska court refused to maintain jurisdiction of Angela's divorce because of the pending action filed by John in Mississippi. Although Angela was appealing the Nebraska court's refusal to hear her divorce, Chancellor Brewer found that she

voluntarily submitted to jurisdiction in Madison County by joining John's request to the Madison County Chancery Court to grant a divorce to the parties on the grounds of irreconcilable differences. RE 2, 12.

After hearing evidence at trial, the Chancellor awarded a divorce to the parties on the grounds of irreconcilable differences and sole physical and legal custody of the three minor children to Angela Jean Benal. A copy of the judgment of divorce can be found at RE 3-11. She directed John to pay one thousand one hundred eighteen dollars ($1,118.00) per month as child support for the three children until they become emancipated or until further order of the Court. RE 10.

The Chancellor also ordered John to maintain health and dental insurance on the children and ordered that the parties equally split all non-covered medical costs. RE 11.

She awarded each party the use of an automobile and awarded John the exclusive use, possession and ownership of the marital home in Ridgeland, Mississippi, along with the furnishings in that home. RE 11. She divided the joint checking and savings accounts equally and awarded the parties their own personal checking, savings and retirement accounts; however, she directed that John should pay Angela twenty-seven thousand dollars ($27,000.00) as her equitable portion of John's retirement account. She directed Angela to maintain the children's existing Nebraska college savings plans for their future benefit. RE 9. Each party was liable for all personal credit card and other debt, with the exception that John was to be solely liable for the mortgage on the former marital home. RE 10.

John filed a timely notice of appeal. C.P. 52-53.

(ii) Statement of the Facts:

At trial, by agreement, John and Angela submitted four issues for the Chancellor's decision:

1. "Custody of the three (3) minor children along with child support and maintenance";
2. "division of marital assets";
3. "liability of payment of marital debts";
4. use of marital home and furnishings."

RE 12.

In support of his position that he should be awarded custody of the minor children, John testified that he did most of the housework, including preparation of evening meals, meals for family and holiday occasions and most of the vacuuming although he admitted that he and Angela shared laundry duties. He tried to get Angela to be more involved with the housework but he never understood why, since the girls were at school all day, she could not keep the house neater. John's mother and brother confirmed that when they were there on family occasions and holidays John did most of the cooking and cleaning up. John's brother testified that he did not understand why the house was dusty when he came on family occasions. Frequently when John's mother visited in the home, the trashcan was dirty and the dishrag was smelly. Angela's housekeeping standards did not measure up to her own. Furthermore, because Angela had failed to decorate the children's rooms, she made curtains, pillows and quilts for the girls. R.II/48-49. When John asked why Angela did not participate more in housekeeping or preparing meals, she said she was tired and did not want to. R.II/29.

John also testified that he was very involved in taking care of the children and that he learned to play dolls and tea with the girls. He also helped them with their homework and joined the PTA and went to meetings with the children's teachers. He admitted that Angela was a loving mother who cared for her children, but believed he was better suited to take care of the children because he had been the more involved in their parenting. He also expressed concern

about having the girls alone in Angela's custody because two of her brothers who were frequent visitors to the home had been convicted of crimes involving sexual assaults of young girls.

Angela confirmed that John was a good father who was very involved with his children although she claimed that some of his claims about how much he did, particularly about attending PTA meetings and Church, were somewhat exaggerated. She did admit that John helped them with lessons while she seldom did although she said she did make sure they completed their homework.

Angela denied that John did most of the housekeeping although she did confirm testimony from John, his mother and brother that on family occasions, John did most of the cooking and that he did clean up after the meals. She claimed, however, that her family also helped clean up after the meals as well. She denied that he cooked most of the evening meals although when asked to describe her typical day in Mississippi, her testimony was conspicuously devoid of any mention of meal preparation or vacuuming. R.II/71-72.

Angela testified to no reason for moving back to Nebraska and taking the children with her rather than staying in Mississippi where the family home now was and where John remained because of his job. John will discuss additional facts in his argument.

SUMMARY OF THE ARGUMENT

John does not contest the division of marital property. However, he does challenge the Chancellor's decision to award sole physical and legal custody of the children to Angela. He claims first of all that the Chancellor committed reversible error in discrediting John and his mother and brother's testimony about his role as principal housekeeper for the family and caretaker of the children.

Furthermore, he argues that the Chancellor committed reversible error in not granting primary physical custody of the children to John. Alternatively, he argues that the Chancellor should have included a specific visitation schedule in the custody order.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EVALUATING THE CREDIBILITY OF JOHN AND HIS WITNESSES.

A. Standard of Review:

On appeal, the Supreme Court must consider the entire record before it and accept all those facts and reasonable inferences which support the Chancellor's ruling. *Madden v. Rhodes,* 626 So.2d 608, 616 (Miss. 1993). The Chancellor's findings will not be disturbed, be they on evidentiary facts or ultimate facts, unless the Chancellor abused her discretion, was manifestly wrong, clearly erroneous, or unless she applied the wrong legal standard. *Id.* A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.,* 525 So.2d 746, 754 (Miss.1987)).

In summary, findings of fact are entitled to deference when reviewed on appeal but will be reversed where they are not supported by substantial evidence. Rulings of law are subject to *de novo* review. *Dorr v. Dorr,* 797 So.2d 1008 (Miss.App. 2001).

B. The Merits:

The Chancellor's decision to discredit John's testimony that he was principal housekeeper and caretaker of the children is not supported by substantial evidence. She made her decision to discount his testimony and that of his mother and brother because, in her words, their testimony that John "did **absolutely everything** for the family while Angela made **no contributions** raise suspicion as to their credibility [emphasis added]." RE 3.

The problem with the Chancellor's finding is that it is based on an erroneous interpretation of their testimony. Neither John nor his witnesses made the extravagant claim that he did "absolutely everything for the family" and that Angela made "no contributions at all."

In John's words: "My testimony is that I did a large **majority** of the cooking" and only rarely did Angela wash the dishes. He testified he did not cook on Saturday mornings. He testified that **Angela did about "fifty-fifty" of the clothes washing** and that he did a "**fair share**" of the vacuuming and cleaning of the house [emphasis added]. The children did their own rooms. R.II/32.

John also admitted that Angela sometimes helped with the homework, was involved to some extent in the PTA and talked to the children's teachers. R.II/41-42.

John's mother's testimony and his brother's testimony were similarly limited in scope. John's mother testified that she visited once or twice a month in the home mostly for dinner and on family occasions and holidays. At those times, John "generally prepared the meals." R.II/45. She also saw him load the dishwasher, clean the table and sweep after meals. R.II/45. She confirmed that she saw John help with homework, and she attended a science fair where John was a judge. R.II/47. She also corroborated John's testimony that he took the children to church every week. R.II/50.

John's brother testified that on the family events and holidays **which is when he mainly saw John, Angela and the children,** John "**usually**" did the cooking and cleaning up. R.II/60. He testified that when John and Angela lived with him for **two months** after John got out of the military, John did "**most**" of the cooking. R.II/62. To say, as the Chancellor did, that John and his witnesses testified that Angela did "nothing" and John did "everything" grossly exaggerates their testimony. Clearly, they did not.

Furthermore, Angela's testimony was largely consistent with that of John's mother and brother in confirming that on family occasions and holidays John did most of the cooking. She also admitted that he cleaned up at those times although she claimed that her family also helped and that she did some of the cooking on those occasions. R.II/73. She claimed that she cooked the family meals. R.II/73.

Moreover, she admitted that John was an active parent, but "not as active as he made out to be." R.II/66. She admitted he did science experiments and helped with homework, but testified he was not a member of the PTO although he did go to one meeting. She said she had gone to two. Both went to parent-teacher conferences. R.II/66. She denied that John took the children to church in Mississippi more than occasionally. R.II/77-78.

Angela, however, confirmed that John's activities in their lives **as he testified** are a "little exaggerated, but true." R.II/82.

She admitted that John was an active parent, but "not as active as he made out to be." She testified he did science experiments and helped with math homework, but testified he was not a member of the PTO although he did go to one meeting. She said she had gone to only two. Both, according to her, went to parent-teacher conferences. R.II/66. In contrast to John who helped the children with homework, Angela admitted that with regard to the children's homework, she "mainly made sure they did it." Sometimes she quizzed them on spelling, but "otherwise I would just make sure it was done." R.II/66.

The testimony, therefore, does not support the Chancellor's credibility determination that John and his witnesses' testimony was not credible. Not only is it not supported by substantial evidence, the overwhelming evidence shows that John was the primary caretaker and housekeeper.

Insofar as much of the Chancellor's analysis of the *Albright* factors[1] was based on her discounting of John's claims that he was principal housekeeper and caretaker for the children, the Chancellor's erroneous view of the testimony mandates reversal and calls into question the validity of her decision to award custody to Angela. Although this Court normally defers to a Chancellor's fact-findings if they are supported by "substantial evidence," it "will not hesitate to reverse" where those findings are not supported by substantial evidence. *E.g., Fields v. Fields,* 830 So.2d 1266, 1268 (Miss. App. 2002).

For example, in *Fields,* the Court reversed a Chancellor for ordering limited visitation with the father in part based on the Chancellor's erroneous interpretation of a report which she read to tie the father to the cause of the child's aggressive behavior problems. In fact, the report drew no such conclusion. The Court, therefore, held that the Chancellor's misinterpretation of the report precluded her from considering it in imposing a restriction on visitation. *Id.* at 1269.

The same is true here. The Chancellor's misinterpretation of John's testimony and that of his mother and brother preclude the Chancellor from discounting their credibility. The Chancellor's adverse credibility determination seriously impaired her determinations on the *Albright* factors and requires reversal.

John will further discuss the impact of the credibility determination in the following proposition where he discusses the Chancellor's findings and ultimate balancing of those factors. He incorporates that discussion into that Proposition and likewise incorporates his discussion of those factors into this Proposition as the two are so interrelated.

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[1] In *Albright v. Albright,* 437 So.2d 1003 (Miss. 1983), this Court set out a list of non-exclusive factors to be used by Chancellors in making child custody decisions. The Chancellor here recognized the applicability of those factors and made findings regarding those factors which John will discuss more particularly in Proposition II.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO AWARD PRIMARY PHYSICAL AND LEGAL CUSTODY OF THE CHILDREN TO JOHN.

A. Standard of Review:

See, Standard in Proposition I.

B. The Merits:

The Chancellor made findings on each *Albright* factor and determined that Angela should be awarded custody of the children. Not only does the Chancellor's adverse credibility determination cause the Chancellor's *Albright* factor determination to be erroneous, she made additional errors of fact and law in determining several of the individual factors that also warrant reversal.

a. **Age, Health and Sex of the Child**: Relying on the Court of Appeals' decision in *Parker v. South,* 913 So.2d 339, 348 (Miss. App. 2005), the Chancellor weighed this factor in favor of Angela because according to her "the three girls will need the guidance and care of their mother as they mature." In *Parker v. South, supra*, the Court of Appeals upheld a finding that this factor favored the father because the child was a young male who had just turned nine years old who needed his father's guidance. *Id.*

John contends that the evidence does not support the Chancellor's finding that the three girls in this case were of such an age that this factor favored Angela as opposed to John. He further contends that the Chancellor erroneously utilized what amounted to the "tender years" presumption in determining this factor.[2]

First of all, this presumption does not apply because the children, ages 14, 11 and 8 are too old for that presumption. *Mayfield v. Mayfield,* 956 So.2d 337, 342 (Miss. App. 2007) [citing

[2] The "tender years" presumption has been considerably weakened by recent decisions of this Court. *E.g., Albright, supra* wherein the Court held that that it would not totally discard the

Torrence v. Moore, 455 So. 697 (1919] [Mother was not entitled to the presumption where children of eight and six and were presumably past the age requiring "the special attention of the mother"]; *J.P.M. v. T.D.M.,* 93 So.2d 760, 771-72 (Miss. 2006) [child of seven is long past the age that requires special care of the mother]; *Jordan v. Jordan,* 963 So.2d 1235, 1240 (Miss. App. 2007) [child is not of "tender years when that child can be equally cared for by persons other than the mother"; noting that a child who is eligible for pre-school indicates she is of an age where she can be cared for by someone other than her mother].

Next, Mississippi statues preclude any discrimination between father and mother based on gender. Miss. Code Ann. §93-13-1 provides that

> The father and mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates. The father and mother shall have equal powers and rights, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor, or any other matter affecting the minor.

Miss. Code Ann. §93-5-24(7) provides: "There shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody." In summary, Mississippi statutes put the mother and father on equal footing in terms of custody.

The Chancellor erred as a matter of law; therefore, when she improperly presumed Angela could better tend to the needs of young girls.

Next, the Chancellor placed undue and unconstitutional emphasis on the gender of the children and mother in making the custody determination. *State ex rel. Watts v. Watts,* 350 NYS2d 285 (1973); *See also, Frontiero v. Richardson,* 411 U.S. 677 (1973).

In addition, the record in this case fails to support a factual determination that the girls would be better off with their mother because of their gender and hers. In the absence of any

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presumption that children of "tender years" would be better cared for by their mothers but would consider the gender and age of the child as part of the overall calculus for determining custody.

specific evidence supporting the need of a particular child for the guidance and care of a specific parent, a Chancellor errs in applying a presumption that female children would be better off with their mother than their father. *See, Greer v. Greer,* 175 N.C.App. 464, 62 S.E.2d 423 (2006). Any presumption in favor of the mother even for children of "tender years" has dubious empirical support. As one court has put it:

> What a mother's care means to her children has been so much romanticized and poeticized that its reality and its substance have sometimes been lost in the flowers of rhetoric. Not all mothers can lay claim to such eulogy . . . .

Stanfield v. Stanfield, 435 S.W.2d 690, 692 (Mo. 1968).

The Chancellor's assumption that, as girls, their mother would better serve the children as they matured is based not on any particular testimony but is founded on what amounts to an unverified assumption by the Chancellor that that would be the case. Angela failed to put on any evidence showing that she had any special bond with the children or any particular skills that made her more qualified than John to administer to the needs of female children. Furthermore, the evidence showed that the girls were smart and independent. In short, other than an unconstitutional assumption that as a woman, Angela was better able to deal with the girls as they matured, the Chancellor's finding has no evidentiary support.

In fact, the evidence supports the notion that John had taken care of the girls, had played with Barbie dolls and played tea, had cooked and cleaned for them, had taught them sports as well as so-called feminine activities and had sought to make the girls well-rounded individuals who could compete in all areas regardless of gender. Even Angela conceded that John had a close bond with his children and had participated in such activities with the children.

In summary, the Chancellor erred in applying what in effect amounted to a "tender years" presumption that Angela, as the mother, was better suited to care for the children, where the children were not of "tender years" and where there was no evidence that the children were in

particular need of a woman's care and where the evidence showed that John was equally capable of carrying for and nurturing his children.

In *Greer v. Greer,* 175 N.C.App. 464, 62 S.E.2d 423 (2006), the trial court applied what in effect amounted to a "tender years" presumption to award custody to the mother finding that in early life by the nature of her age and gender, the mother was best qualified to have custody. The appellate court held that the finding that the mother was best suited to take care of a young child was not supported by any evidence but rather was based on judicial notice that young children were best attended to by their mother. The Court rejected the argument that such a presumption was appropriate. The appellate court found that since the record reflected no specific evidence as to the closeness of the child and her mother or a particular bond existing between the two, the case must be reversed. *Id.* 62 S.E.2d at 428.

Except for the age of the children, *Greer* is virtually indistinguishable from this case. No evidence supports the notion that Angela is any better suited to raise the girls than is John; nor is there any evidence that the children are closer to their mother or require particular care from their mother. What the Chancellor has done is to apply an unconstitutional presumption that absent special circumstances, a mother is more able to care for young girls than their father. Not only does the evidence not support this finding, the evidence shows that it is John who was more sensitive to the needs of the children than Angela. This factor should have been weighed in favor of John.

b. **Continuity of Care**: The Chancellor found that this factor "strongly" favored Angela because she had been a "more constant factor in their daily lives" having been a full-time homemaker who had some part-time employment outside the home. She stayed in Nebraska with the children until they finished the school year and also had been in their exclusive caretaker

since the separation in December of 2007 with the exception of one visit from John and some visits from his family. RE 4.

The Chancellor erred in finding that this factor weighed "strongly" in favor of Angela. Although it is true that Angela did stay with the children in Nebraska until they finished the school year and had taken care of them from the latter part of December of 2007 until May of 2008 when the hearing occurred, the Chancellor failed to take into account the fact that John had provided continuous care of the children with the exception of these two short periods of time when he moved to Mississippi in order to secure a good job and when Angela took the children and left Mississippi—thereby depriving John of the opportunity of the chance to assume the active role in caring for the children which he had previously maintained. *Hammers v. Hammers,* 890 So.2d 944, 951 (Miss. App. 2004) [holding that time between the separation and trial should be considered along with the continuity of care prior to the separation, with neither being given greater weight].

In *Hammers,* the Court found that the continuity of care before the separation, however, was possibly a better indicator to determine what was in the best interests of the children than what occurred after the separation. *Id.* The same is true here, and the Chancellor gave insufficient weight to John's care of the children prior to the time he came to Mississippi.

Furthermore, John kept in touch with the children once they moved back to Nebraska with telephone calls, e-mail and the Internet chat sessions. He tried to contact them daily although sometimes they were not at home. R.II/26. Although he requested that Angela send him the children's grade reports, Angela did not do so. R.II/27. Even Angela confirmed that John stayed in close contact with the children during these times and played Scrabble with Sarah on the Internet at night. R.II/79.

In other words, the Chancellor gave insufficient weight to the continuous care John had given to the children before unavoidable circumstances (including Angela's taking the children from him) separated him for two short periods of time from the children. *Hammers, supra.*

Furthermore, since the children were older and in school, neither parent would be continuously with the children while they were at school. Both parents were now working so that neither would be available to the children during school hours, except when both would presumably be available for emergencies. Therefore, the Chancellor gave too much weight to Angela as a stay at home mother when the children were not of school age.

This factor should have favored John.

c. Parenting Skills: The Chancellor found that this factor favored John but only "slightly." John contends that this finding is not based on substantial evidence and is manifestly erroneous. The Chancellor should have found that this factor weighed heavily in John's favor.

The Chancellor admitted that John "handled most of the discipline . . . and was very active in extracurricular activities."[3] RE 4. By contrast, she found that Angela took two girls to school while John took one, and both parents helped with homework and cared for the children's daily needs. *Id.*

In making her decision to weigh this factor only "slightly" toward John, the Chancellor, however, erroneously ignored testimony from John that although Angela was a stay at home mother, he prepared most of the evening meals except when they ate out. R.II/13. Significantly, her decision to discredit this testimony was based on an erroneous view of what John and his mother and brother testified to. *See, Proposition I.*

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[3] John testified that rather than physical forms of punishment, he tried to make the children aware of what the discipline was for and tried to make it relevant to the situation. R.II/18. John monitored their internet use religiously, checking their browsing history and installing software which would prohibit access to inappropriate content. The computer was also placed in the family area so that the children would not have private access to the Internet. R.II/19.

Furthermore, in making a finding that both parents equally helped with the homework and cared for the children's daily needs, she again ignored testimony that John was the primary housekeeper and caretaker for the children. Her decision was based on her erroneous determination that John's evidence was not credible. This credibility decision was not supported by substantial evidence. *See, Proposition I.*

In addition, not only did John's evidence support the idea that he helped more with the children's homework, Angela admitted that this was the case. Angela testified that with regard to the children's homework, she "mainly made sure they did it." Sometimes she quizzed them on spelling, but "otherwise I would just make sure it was done." R.II/66.

She admitted that John was an active parent, but "not as active as he made out to be." She admitted he did science experiments and helped with math homework, but testified he was not a member of the PTA although he did go to one meeting. She said she had gone to two. Both went to parent-teacher conferences. R.II/66.

In view of the evidence regarding John's active participation as primary care taker and his experience as a teacher of gifted children, John clearly had superior parenting skills and furthermore was willing to spend substantial time on the children's education and extracurricular activities. There is no evidence that Angela spent a similar amount of time on their education or participated to the extent John did in their extracurricular activities. The Chancellor, therefore, erred in not weighing this factor heavily in John's favor.

d. Willingness and Capacity to Provide Primary Care: The Chancellor found that this factor favored neither parent. Again, insofar as the Chancellor improperly weighed the credibility of John's evidence on this factor, the Chancellor erred in evaluating this factor that should have been weighed in John's favor. *See, Proposition I.* John had taught gifted children and was clearly more suited to assist the children as their studies became more difficult.

In fact, as John has previously shown, he was not only willing to and had the ability to devote substantial time to the children's education and care, as even Angela admitted, he had in fact done so. John also had demonstrated that he was more willing than Angela to keep the house maintained and to take care of the children's particular needs and to raise them as well rounded people and to participate in their extracurricular activities. The marital home in Ridgeland, which had separate bedrooms for each child, and a swimming pool, was also more suitable than the apartment rented by Angela. *See, Jordan v. Jordan,* 963 So.2d 1235, 1241 (Miss. App. 2007) [finding that the fact that the wife resided in a small apartment made the home less suitable than the house which the husband could provide].

John also had a superior capacity to support the children financially. In *Jordan v. Jordan,* 963 So.2d at 1241, the Court held that the husband's superior capacity to provide financial support outweighed that the wife had more time to spend with the children.

e. Employment Responsibilities and Stability of Employment. The Chancellor found that this factor favored neither party since although John had "worked hard throughout the marriage to provide financially for his family finding steady employment since retiring from the military", Angela's temporary work at J.C. Penneys and the University of Nebraska and her current employment since February of 2008 as a customer service representative for Perot Systems balanced John's responsibilities and stability of employment. RE 4.

The Chancellor clearly erred in not weighing this factor in John's favor. Angela's prior job experience consisted of two temporary jobs—one in retail and one as an operator. Rather than using this money to contribute to the household, Angela opened her own account and admitted she deposited the money into her own account. R.II/37, 73.

At the time of the hearing, she had been employed as a customer service representative for only a few months. She offered no evidence of her hours or the nature and stability of her

employment. It appears from her financial statement that she made approximately $1700 a month. C.P. 31-32.

John, on the other hand, had been steadily employed since retiring from the military. His income went to support the family and to save for his retirement and Angela's. He was presently working at his job as Project Manager at Cellular South from eight to five, Monday through Friday, with weekends and major holidays off. R.II/40. He testified that this was the best job he had ever had and that he loved the job, the community and the people he worked with. His financial statement showed at income of approximately $6,000 a month. C.P. 21.

John's steady employment and job responsibilities showed him to be a responsible and stable provider. He contributed regularly to a retirement account and even contributed to one for Angela. R.II/30.

John demonstrated that his job at Cellular South was such that he had plenty of time to spend with the children in his off-hours and had done so while they were in Mississippi. Angela, by contrast, offered no testimony about her job hours.

John testified he had a "secure" job. He testified:

> I love Ridgeland, Mississippi. I love Mississippi in general. Moving here was the best thing that ever happened to me, and I thin it's the best thing that ever happened to the kids. The educational opportunity is great here. The culture is great. The people are wonderful. This is a gift dropped in my lap, having a chance to move here.

R.II/31.

In reviewing a similar finding in *Mayfield v. Mayfield,* 956 So.2d 337, 343-44 (Miss. App. 2007), the Court upheld a finding that where the mother had held only sporadic employment throughout the marriage and had held her job for only three months; whereas, the father had maintained stable employment as a fireman, the Chancellor correctly held that the husband's employment was more stable. Similarly in *DeVito v. DeVito,* 967 So.2d 74, 76 (Miss.

App. 2007), the Court held that the husband's steady employment with the same employer favored him rather than the wife who had held five or six jobs. The evidence, therefore, does not support the Chancellor's finding that this factor favored neither parent. Clearly, the evidence favored John.

f. Age and Physical and Mental Health of Parents: The Chancellor found that this factor favored neither parent, and John does not challenge that finding.

g. Emotional Ties of Parent and Child: Similarly, John does not challenge the finding that this factor favored neither parent.

h. Moral Fitness of the Parent: Likewise, John does not challenge the Chancellor's finding that this factor favored neither parent.

i. **Home, school and community record of the child**: The Chancellor found that this factor weighed "strongly" in favor of Angela because the family had lived in Nebraska for the ten years prior to moving to Mississippi in 2007 and because most of the children's relatives lived in or near Nebraska rather than Mississippi. The Chancellor also used the fact that the children had lived longer in Nebraska than in Mississippi in weighing other factors--thereby triple counting this factor unfairly to Angela's advantage. The Chancellor further found that the children were good students and involved in numerous extracurricular activities. RE 5-6.

John contends that the Chancellor improperly weighed this factor "strongly" in favor of Angela because she failed to take into consideration the fact that the children had been living in Mississippi prior to the time Angela removed them to Nebraska and had adjusted extremely well to their new home in Ridgeland. All three were making excellent grades. R.II/14. All, with the possible exception of Sarah, who refused to try to adjust, were participating in extracurricular activities and had made many new friends.

Moreover, John had a four-bedroom house with a pool; whereas, Angela was living in an apartment that she had just moved into. She offered no testimony about the children's living conditions at home after they moved back to Nebraska.

As discussed previously, John testified that he was very involved in the children's education. John at one time had been a teacher and mentor for gifted students in the Lincoln Public School System. He helped with science projects, encouraged them to come up with ideas for projects in science and math and helped also with literature and art both when they lived in Nebraska and in Ridgeland. R.II/14. He learned to play with Barbie dolls and to play at tea and other things that little girls liked to do. However, he also thought them "other things that maybe society as a rule doesn't necessarily expect women or girls to do" such as how to play golf. He was himself a football and basketball referee for twenty years and he taught them how to referee. They played basketball, and he encouraged them to go out for dance, theater and soccer. R.II/16.

John was active in the PTA and volunteered as a judge when there were science fairs and sold raffle tickets and monitored carnival games and "things of that nature." R.II/16.

John also tried to help Katherine with her clothing problem. Although only eleven, Katherine was muscular and had difficulty finding children's clothing in her size. John testified that this problem arose because Angela typically did all the shopping for all three children at places which had clothing which would fit the two other girls who were slim and petite, but would not fit Katherine. Therefore, he frequently took Katherine on shopping trips for clothes which helped the problem. R.II/17.

He cooked healthy meals for all three children, including meats, vegetables, fruits and dairy. R.II/18.

Angela's younger brother, James Burke, visited frequently in the home (approximately three times a month when they lived in Nebraska and on special occasions such as holidays). He

had been convicted of misdemeanor sexual assault and served three months in 1989. R.II/19-20. Her other brother Martin also visited frequently in Nebraska for family or special events such as Christmas, Thanksgiving, Easter, First Holy Communions, confirmations, etc. R.II/21-22. Martin also had a history of sexually related offenses against young girls. R.II/21.

In addition to making sure the children attended Mass in Nebraska and understood the basic tenants of the faith "not just in dogma, but in practice," John also took the children to Mass regularly after moving to Ridgeland and got them involved in the Sunday evening youth groups. R.II/23. The girls enjoyed the Mississippi parish and priest because unlike in Nebraska, girls were allowed to participate in the mass. R.II/24.

All three girls made a lot of friends. Erin was a "social magnet" in the neighborhood with children coming over to play and frequent invitations to birthday parties. Katherine played on a local soccer team in Ridgeland and bonded well with her teammates. R.II/25.

The house in Ridgeland had four bedrooms and each girl had her own bedroom which John allowed her to decorate. R.II/25. John regularly assigned chores such as taking out the trash, walking the dog and getting the mail. R.II/25.

Angela failed to offer evidence to refute allegations that her housekeeping left something to be desired. Although Angela's housekeeping skills do not make her an unfit parent, as this Court has pointed out, they do not weigh in her favor. *Jordan v. Jordan,* 963 So.2d 1235, 1242 (Miss. App. 2007).

Significantly, with the possible exception of testimony that Sarah pouted while in Mississippi and intended to become more involved in extracurricular activities now that she was back in Nebraska, there is no evidence to suggest that the children suffered any harm as a result of their time in Mississippi or that they would do so in the future if required to live there. Angela did not contest that the children did well in school in Mississippi, as they did in Nebraska.

Although there was no evidence to suggest that the children were not attached to their relatives in Nebraska, there was also no evidence that they would be suffer inordinate damage by living in Mississippi.

Although the Chancellor was entitled to give weight to the fact that in Nebraska, the children would have a large extended family and would stay with their old classmates, the Chancellor gave Robin too much weight for this factor without balancing those factors with the advantages the children would have in Mississippi—not the least of which are that they would be close to their father. Since Angela could have easily relocated to Mississippi, the Court improperly weighed this factor in favor of Angela rather than John.

k. Preference of Child: The Chancellor found that this factor favored neither parent.

l. Stability of Home Environment: The Chancellor found that this factor favored Angela because both her relatives and John's live in Nebraska where the couple had lived for ten years prior to moving to Mississippi. RE 6. Again, the Chancellor used these facts to weigh two other factors in Angela's favor. For the reasons previously stated, the Chancellor gave undue weight to this factor in the absence of evidence that the children were better off in Nebraska while ignoring substantial evidence from John about countervailing factors.

Moreover, the Chancellor erroneously found John's ties to be minimal because he had lived in Mississippi for "a little more than a year." RE 6. No evidence, however, supports the notion that John's ties are minimal. John testified that he loved the community, his job and the people he worked for, and he testified that he was active in his church. He was in a "secure position" with Cellular South. R.II/26. He had a house with four bedrooms, and had an income adequate to obtain child care services if they became necessary. There is no evidence that Angela's home environment was more stable than John's or that the presence of her relatives added to the stability of her home.

On the contrary, Angela had two brothers who visited regularly in her home who had been convicted of sex crimes involving young women. R.II/21-22. Far from contributing to the stability of the home, Angela's relatives posed a potential threat to the children's well being—a fact that was ignored by the Chancellor in determining that it was in the best interests of the children to be with Angela.

In similar circumstances, the Court has held that a mother who allows someone to visit or live in the home who might pose a threat to the safety of a child exhibits poor parental judgment. *See, Street v. Street,* 936 So.2d 1002 (Miss. App. 2006) [decision to allow boyfriend with criminal record to reside with children exhibited poor judgment by mother]. Certainly, the Chancellor committed legal error in failing to even consider this problem in making a decision on this factor and on the question of what would be in the girls' best interests in award custody.

The Chancellor, therefore, erred in finding that this factor favored Angela rather than John. John had the more stable home which posed no physical or mental threat to the children.

m. Other Relevant Factors: The Chancellor found that other factors were not determinative. RE 6.

The essential point which the Chancellor overlooks throughout her analysis of the *Albright* factors is that by awarding primary custody to Angela who voluntarily moved back to and now lives in Nebraska, the Chancellor is making it extremely difficult for John to continue his participation in the children's parenting. Rather than remaining in Mississippi, Angela chose to return to Nebraska.

Angela had no home or job to return to. She now lives in an apartment with the children. She secured a job as a customer service representative only after she returned. There is no evidence that she could not have obtained similar employment and an apartment here. In fact, she could have asked for and received the family home had she remained in Mississippi. In

moving, she seems to have been motivated by a desire to obtain more favorable divorce terms in Nebraska and to be near her family. Whatever her motives, by choosing to go to Nebraska, she has effectively deprived both John and the children of his participation in their lives.

The Chancellor failed to consider that had she awarded custody to John, Angela could have easily found a job and a place to live similar to that in Nebraska; whereas, John obviously would have more difficulty finding a similar job in Nebraska. John's choices are to abandon a stable, good paying job that will ensure that he can support his family and abandoning that job for an uncertain future in Nebraska. The Chancellor failed to weigh the relative hardships to the parties when she awarded custody to Angela rather than John.

In summary then, the Chancellor committed clear error in her fact-findings and erroneously applied the law in weighing the *Albright* factors. This court should award custody to John or alternatively, reverse and remand for a new trial.

III. THE TRIAL COURT ERRED IN FINDING THAT SHE LACKED AUTHORITY TO ORDER VISITATION.

A. Standard of Review:

See, Proposition I.

B. The Merits:

The trial court erred as a matter of law in not ordering a specific visitation schedule because of her conclusion that the stipulation between the parties on the issues to be decided divested her of "authority" to order specific visitation. Should the Court decide that reversal is not warranted, the Court should then consider whether a limited reversal is warranted because the Chancellor failed to order a specific visitation schedule for John.

Prior to the trial, the parties stipulated to four issues to be determined by the Chancellor One of these was "the Custody of the three (3) minor children along with child support and maintenance." RE 12. The Chancellor subsequently determined that "[t]his Court lacks authority

to order specific visitation at this time" and therefore she did not set forth a specific visitation schedule nor did she grant John visitation in her final decree. RE 7.

In so holding, the Chancellor erred as a matter of law and/or fact. First of all, it is by no means clear that in stipulating to the determination of "custody," along "with child support and maintenance," the parties were not agreeing in the context of this case to a determination of visitation as well.

As a general rule, "[w]hen a court awards exclusive child custody to one parent, the non-custodial parent maintains the right to see and visit the child, absent extraordinary circumstances. If the court's custody decree fails to mention visitation rights, the law implies the parent's right to visitation." *http://topics.law.cornell.edu/wex/Child_custody.* Thus, although the law in this case implies a right to John to reasonable visitation, the Court failed to set forth a specific visitation schedule because she had no "authority" to do so. In asking that the Chancellor determine custody, however, the parties were implicitly requesting a determination of the attendant right of visitation. In view of the distances and therefore expense involved for John to go to Nebraska, the Chancellor should have set out a specific visitation schedule, rather than leaving visitation to Angela's discretion.

Miss. Code Ann. §95-5-2 provides that "No divorce shall be granted [on the ground of irreconcilable differences" until **all matters** involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce [emphasis added]." This Court has held that the failure to do so is error. *Rounsaville v. Rounsaville,* 732 So.2d 909 (Miss. 1999). In *Lowery v. Lowery,* 919 So.2d 1112 (Miss. 2005), this Court held that provisions for the care and maintenance of the children in the parties' property settlement agreement were not "adequate or

sufficient" as required by §95-5-2 where they omitted a specific visitation schedule for care and maintenance of the children.

Finally, the Chancellor was mistaken that she could not exercise her discretion to decide an issue not specifically submitted to the court. In *Johnston v. Johnston,* 722 So.2d 453 (1998), this Court held that a Chancellor could exercise its discretion to decide issue of alimony although alimony was not an issue submitted to the court for decision. *See also,* §93-5-23, Miss. Code Ann. which provides that when a divorce is decreed, "the court may, in its discretion . . .make all orders touching the care, custody and maintenance of the children . . . ." *See also, Perkins v. Perkins,* 787 So.2d 1256 (Miss. 2001) [court should strictly adhere to requirements of §95-5-2, Miss. Code Ann.]

In short, the Chancellor erred in finding that she lacked authority to decide specific visitation, and this Court should reverse and remand on this issue.

CONCLUSION

The Chancellor's decision to award custody of the children to Angela is not supported by substantial evidence; nor is it supported by law. This Court should render judgment in favor of John. Alternatively, the Court should reverse for a new trial. Failing this, the Court should remand with instructions for the Court to enter a reasonable visitation schedule for John.

RESPECTFULLY SUBMITTED,
JOHN PATRICK BENAL, APPELLANT

BY: 
ATTORNEY FOR APPELLANT

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellant, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, the original and three copies of the foregoing

to the Clerk of this Court at PO Box 249, Jackson, MS 39205-0249 and a true and correct copy to F. Andrew Howell, Esquire, counsel for Angela Jean Benal, at 318 State Street, Jackson, Mississippi 39201 and to Chancellor Cynthia Brewer, PO Box 404, Canton, MS 39046.

This, the 20th day of January, 2009.

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