IN THE SUPREME COURT/COURT OF APPEALS
FOR THE STATE OF MISSISSIPPI

EDWARD DARRELL MOORMAN — **APPELLANT**

VS. — **CAUSE NO. 2008-CA-01723**

REBECCA JANE WALDO MOORMAN — **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following listed persons may 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.

Chancellor:	The Honorable Talmadge D. Littlejohn New Albany, Mississippi
Former Chancellor:	The Honorable Jacqueline Estes Mask Tupelo, Mississippi
Appellant:	Edward D. Moorman Pontotoc, Mississippi
Appellee:	Rebecca Jane Waldo Moorman Pontotoc, Mississippi
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	Tim Tucker Waldo & Tucker, PLLC Pontotoc, Mississippi
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Guardian Ad Litem:	Laura Murphy (deceased) Booneville, Mississippi

Other Interested Parties:

James Reeves
Shannon, Mississippi

Darlene Reeves
Shannon, Mississippi

Earl David Moorman
Pontotoc, Mississippi

Jan Moorman
Pontotoc, Mississippi

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Attorney for Edward D. Moorman

STATEMENT REGARDING ORAL ARGUMENT

Edward Moorman, Appellant, acting pursuant to Miss. R. of Civ. P. 34(b), makes this statement regarding oral argument, to-wit:

This action involves the appropriate application of the holding in *Sparkman v. Sparkman*, 441 So.2d 1361 (Miss. 1983) in child custody cases. The Chancellor made brief reference to the *Sparkman* opinion in his ruling without discussing its holding (*i.e.*, that it is not in the best interest of children to be separated in the absence of an unusual and compelling circumstance).

This action may give the Court an opportunity to require that chancellors explicitly reference the *Sparkman* holding in all child custody cases where children may be separated from their siblings, just as the factors espoused in *Albright v. Albright,* 437 So.2d 1003 (Miss. 1983) must be expressly set forth in all custody cases. Oral argument will assist this Court in evaluating whether such a requirement is necessary in future cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULE

STATEMENT OF THE ISSUE

ISSUE #1: WHETHER THE CHANCELLOR COMMITTED MANIFEST ERROR BY ORDERING THAT THE MINOR CHILDREN BE SEPARATED FROM THEIR OLDER HALF-SIBLINGS WITHOUT (1) IDENTIFYING SOME UNUSUAL AND COMPELLING CIRCUMSTANCE TO JUSTIFY THE SAME IN HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND WITHOUT (2) MAKING PROVISION IN HIS ORDER TO ASSURE THAT THE SEPARATED SIBLINGS WOULD BE TOGETHER AS MUCH AS IS REASONABLY PRACTICABLE GIVEN THEIR RESIDENCE IN SEPARATE COMMUNITIES AND THEIR ATTENDANCE AT DIFFERENT SCHOOLS.

STATEMENT OF THE CASE

I. Procedural History

This case was commenced with the opening of Cause No. 2003-0034 in the Chancery Court of Pontotoc County, Mississippi. Chancellor Jacqueline Estes Mask assumed jurisdiction of the matter and entered a *Temporary Agreed Order* giving custody of the minor children to Edward Moorman. The parties subsequently reconciled their relationship for a brief period. Nevertheless, Cause No. 2003-0034 was never dismissed, and Chancellor Mask never rescinded the *Temporary Agreed Order*.

The case was recommenced by the filing of a *Complaint for Divorce, Child Custody, and Other Relief* by Edward D. Moorman in the Chancery Court of Pontotoc County, Mississippi (Cause No. 2004-0021-58-L) on January 16, 2004. This matter was assigned to Chancellor Talmadge Littlejohn. Following a temporary hearing, Chancellor Littlejohn awarded custody of the minor children to Rebecca Moorman. Chancellor Littlejohn later consolidated Cause No. 2003-0034 with Cause No. 2004-0021-58-L, rescinding the order made by Chancellor Mask.

Trial was held on January 2-3, 2008, and was continued until April 10, 2008, at which time the Chancellor entered his ruling from the bench. A subsequent written order incorporating the ruling was entered on August 13, 2008. Therein, permanent custody of the minor children and appurtenant child support was awarded to Rebecca Waldo Moorman.

Feeling aggrieved thereby, Edward D. Moorman has perfected his appeal and now presents this case to be reviewed by this Honorable Court.

[Legend — R.E = Record Excerpts; C.P = Court Papers; T= Transcripts]

II. Statement of the Facts

Edward Moorman and Rebecca Moorman were married on August 21, 1999 in Pontotoc County, Mississippi. [R.E. at 63; C.P. at 1] The parties have two children, namely, A. K. (born in 2000) and C. R. (born in 2001).[1] [R.E. at 63; C.P. at 1] In addition, Edward Moorman has three children by a previous marriage ranging in age from twelve to sixteen years as of the time of trial. [R.E. at 91-93; T. at 106-08] Mr. Moorman has sole custody of these children as their biological mother's parental rights had been terminated by earlier order of the court. [R.E. at 16; T. at 499] All five of the children are very close to one another. [R.E. at 91-95, 103-04; T. at 106-08, 113-14, 494-95]

The parties separated in January 2003, at which time Cause No. 2003-0034 was opened. [R.E. at 76, 90; C.P. at 119; T. at 104] Later that year, the parties reconciled. [R.E. at 90; T. at 104] The parties separated again in January 2004, prompting Edward Moorman to file his *Complaint for Divorce, Child Custody, and Other Relief* in Cause No. 2004-0021-58-L. [R.E. at 77; C.P. at 120] On December 18, 2006, the Chancellor consolidated Cause No. 2003-0034 into Cause No. 2004-0021-58-L. [R.E. at 76-78; C.P. at 119-21]

In March 2004, the Chancellor awarded temporary custody of A. K. and C. R. to Rebecca Moorman. [R.E. at 71-75, 79-88; C.P. at 28-32; T. at 69-78] Since then, A. K. and C. R. have lived with their mother in Shannon, Mississippi, where they attend school. [R.E. at 96; T. at 115] Edward Moorman and his three older boys live in Pontotoc, Mississippi, where the older boys attend school. [R.E. at 96; T. at 115]

Trial was held on January 2-3, 2008, and was continued until April 10, 2008. [R.E. at 16;

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[1]In the interest of protecting the children's privacy, their respective initials will be used instead of their given names.

T. at 499] At the conclusion of the trial, the court-appointed guardian ad litem, Ms. Laura Murphy, delivered an oral report detailing her recommendations. [R.E. at 97-106; T. at 488-97] Therein, she reported: "Separating siblings concerns me. I know the three older boys. I've interviewed the oldest. And he testified in this court unfortunately. They love their two little brothers. And it does concern me that they be separated." [R.E. at 103-04; T. at 494-95]

After Ms. Murphy delivered her report, the Chancellor delivered his findings of fact and conclusions of law from the bench. [R.E. at 15-59; T. at 498-542] Therein, the Chancellor acknowledged Ms. Murphy's concern about separating A. K. and C. R. from their older siblings, even noting that the law frowns upon the separation of siblings. [R.E. at 16-17; T. at 499-500] However, aside from stating that the children were half-siblings, the Chancellor made no additional comments on the subject of their separation, even though he expressed his intention to do so. [R.E. at 15-59; T. at 498-542] Likewise, the Chancellor described no unusual and compelling circumstance to require the separation of A. K. and C. R. from their older brothers, nor did he make provision in his ruling for the younger boys to be with their older brothers as much as is practicable given their residence in separate communities and their attendance at different schools. [R.E. at 15-59; T. at 498-542]

On June 8, 2008, a written order incorporating the Chancellor's ruling was signed *nunc pro tunc* to April 10, 2008 and was entered on August 13, 2008. [R.E. at 8-14; C.P. at 175-181] As with the oral ruling, no mention is made of the children being separated in this written order. [R.E. at 8-14; C.P. at 175-181] On September 5, 2008, Mr. Moorman obtained a thirty-day extension to file a notice of appeal pursuant *Miss. R. of App. Proc. 4 (g)*. [R.E. at 107; C.P. at 185] On October 3, 2008, Mr. Moorman filed a timely notice of appeal. [R.E. at 108; C.P. at 187] Mr. Moorman now presents this case to be reviewed by this Honorable Court.

SUMMARY OF THE ARGUMENT

The Chancellor's order granting custody of A. K. and C. R. to their mother should be reversed, and this matter should be remanded for new trial, because the Chancellor addressed no unusual and compelling circumstance to warrant the separation of A. K. and C. R. from their older brothers, and because the Chancellor made no provision in his order to assure that A. K. and C. R. would be with their older brothers as much as is reasonably practicable given their residence in separate communities and their attendance at different schools.

The polestar consideration in child custody cases is the best interest of the child. *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss. 1983). It is not in the best interest of children to be separated from their siblings unless there is some unusual and compelling circumstance to dictate otherwise. *Sparkman v. Sparkman*, 441 So.2d 1361, 1362-63 (Miss. 1983). Although the Chancellor recognized the existence of these precedents in his opinion, he described no unusual and compelling circumstance to necessitate the separation of A. K. and C. R. from the their older brothers. In fact, he offered no specific justification at all.

By ordering the separation of A. K. and C. R. from their older brothers without describing some unusual and compelling circumstance to warrant the same, the Chancellor failed to act in A. K. and C. R.'s best interest. Likewise, by failing to make provision in his order for the siblings to be together as much as is reasonably practicable given their residence in separate communities and their attendance at different schools, the Chancellor failed to act in the children's best interest. Thus, the Chancellor committed reversible error.

ARGUMENT

I. Standard of Review

This Court's standard of review is limited in custody matters. "For this Court to reverse, the chancellor's custody decision must have applied an incorrect legal standard or have been manifestly wrong or clearly erroneous." *Gilliland v. Gilliland*, 969 So.2d 56, 63 (Miss App. 2007) (citing *M.C.M.J. v. C.E.J.*, 715 S o.2d 774, 776 (Miss. 1998)). However, even if a chancellor were to apply the correct standard for determining the custody of a child, a reversal would still be warranted if procedural errors were apparent. *See Lee v. Lee*, 798 So.2d 1284, 1291-93 (Miss. 2001) (where the Court agreed with the chancellor's application of the factors as delineated in *Albright v. Albright,* 437 So.2d 1003 (Miss. 1983), but nevertheless reversed the chancellor on procedural grounds). Accordingly, if this Court determines that the Chancellor's decision was manifestly wrong or clearly erroneous—or that the chancellor used improper procedures to reach his conclusion—a reversal will be warranted.

II. The Chancellor Committed Manifest Error by Ordering That the Minor Children Be Separated from Their Older Half-Siblings Without (1) Identifying Some Unusual and Compelling Circumstance to Justify the Same in His Findings of Fact and Conclusions of Law, and Without (2) Making Provision in His Order to Assure That the Separated Siblings Would Be Together as Much as Is Reasonably Practicable Given Their Residence in Separate Communities and Their Attendance at Different Schools.

"The polestar consideration in child custody cases is the best interest and welfare of the child." *Albright,* 437 So.2d at 1005. Although there is no hard and fast rule that siblings should not be separated, *Price v. McBeath*, 989 So.2d 444, 459 (Miss. App. 2008) (citing *Copeland v. Copeland*, 904 So.2d 1066, 1076 (Miss.2004)), the Supreme Court has held 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 v. Sparkman*, 441 So.2d 1361, 1362-63 (Miss.

1983) (emphasis added).[2]

The Chancellor referenced the aforementioned *Sparkman* opinion *sua sponte* in his findings of fact and conclusions of law:

> Edward has three children by a previous marriage. On June 28th, 2000, the Court terminated the parental rights of the children's mother. Edward Moorman now has custody of the three boys. Those boys and their custody are not before this Court today. However, they've been so inter related in some of the testimony here that the Court has to note in the findings of fact in reference to them. This is particularly true in view of the concern of the guardian ad litem and the separation of the siblings, admittedly half-brothers. And of course, this is a concern of the Court as well. The case of *Sparkman v. Sparkman* looks on with disfavor on separating siblings. Nevertheless, I'll comment on that a little bit more thoroughly later.

[R.E. at 16-17; T. at 499-500]

Unfortunately, the Chancellor never expounded upon the *Sparkman* case as he had intended, nor did he address any unusual and compelling circumstance that would necessitate the separation of A. K. and C. R. from their older brothers. [R.E. at 17-59; T. at 500-542] *See id.* In fact, the Chancellor never mentioned the issue of sibling separation again in either his oral opinion or in his written order.[3] [R.E. at 8-59; C.P. at 175-181; T. at 498-542] Therefore, because the Chancellor mentioned no unusual and compelling circumstance that would warrant the separation of A. K. and C. R. from their older brothers, this Court should follow past precedent and presume that there were none. **"If there were any special circumstances in this case,"** the *Sparkman* Court notes, **"we believe that the Chancellor would have set it out in his**

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[2]This Court should take notice that the conjunctive *and* is used, not the disjunctive *or*. Therefore, a circumstance must be both unusual and compelling to justify separating siblings.

[3]Incidentally, the Chancellor made reference to the *Sparkman* case in the preliminary hearing where he granted temporary custody to the mother. [R.E. at 79-80; T. at 69-70] At both the temporary hearing and at trial, the Chancellor expressed his intention to elaborate upon the *Sparkman* case (which the transcript mistakenly refers to as *Spartman*), but on both occasions he failed to do so.

opinion." *Id.* (emphasis added).

By separating A. K. and C. R. from their older brothers in the absence of some unusual and compelling circumstance, the Chancellor failed to act in their best interest. *See id.*; *cf. Bowen v. Bowen,* 688 So.2d 1374, 1381 (Miss. 1997) (where the chancellor specifically detailed an unusual and compelling circumstance for the separation of two siblings); *Carson v. Natchez Children's Home,* 580 So.2d 1248, 1257 (Miss. 1991) ("[It] is presumed that the best interest of a child will be served by remaining in the custody of the natural parent. . . . Almost as strong is the imperative that siblings should not be required to live apart.") (internal citations omitted); *Price,* 989 So.2d at 459 ("Chancellors certainly have factored in any potential negative effects of splitting up siblings, including half-siblings, when determining custody."); *Sumrall v. Sumrall,* 970 So.2d 254, 259 (Miss. App. 2007) (where the chancellor observed that the half-siblings in question were close, and that to separate them would be harmful, difficult, and not in their best interest); *but see C.W.L. v. R.A.*, 919 So.2d 267, 270-73 (Miss. App. 2005) (where the issue of sibling separation was not given much consideration as the child was being sexually abused by his step-father). Therefore, by failing to act in the best interest of the children—*i.e.*, the "polestar consideration" of any custody case—the Chancellor committed manifest error for which reversal is appropriate. *See Albright,* 437 So.2d at 1005; *see also Gilliland*, 969 So.2d at 63.

Beyond this, even if there were some unusual and compelling reason to separate A. K. and C. R. from their brothers, it was reversible error for the Chancellor not to have specifically addressed such reasons in his findings of fact and conclusions of law as he had expressly intended. It is well-established that "a chancellor's failure to make specific findings as to each individual *Albright* factor is reversible error." *Davidson v. Coit*, 899 So.2d 904, 911 (Miss. App. 2005) (*citing Powell v. Ayars*, 792 So.2d 240, 249 (Miss. 2001)). By comparison, a chancellor's

failure to specify the unusual and compelling circumstance necessitating the separation of siblings should be reversible error as well. *Cf. Sparkman*, 441 So.2d at 1362-63.

The *Albright* Court and the *Sparkman* Court were comprised of the same learned justices who concurred unanimously in both opinions, which were delivered within three months of each other. *Compare id. with Albright,* 437 So.2d at 1005. Given that (1) both opinions speak directly to the best interests of minor children in custody cases, that (2) both opinions were written by the same justices, and that (3) both cases were before these justices at or about the same time, both opinions should be interpreted collectively as one cohesive document, just as statutes "which relate to the same subject matter or are *in pari materia* must be read together to determine the mind of the legislature." *Wilbourn v. Hobson,* 608 So.2d 1187, 1191 (Miss. 1992).

As such, this Court should overturn the holding in *C.A.M.F. v. J.B.M*, 972 So.2d 656, 661 (Miss. App. 2007) and require that chancellors specifically address the issue of sibling separation in their findings of fact and conclusions of law. For if *Albright* and *Sparkman* are interpreted together, then it would be inconsistent for the Court to require that chancellors give a detailed specification of each *Albright* factor under penalty of reversal while simultaneously holding that a similar discussion of the *Sparkman* factor is purely discretionary. *Cf. Davidson*, 899 So.2d at 911. Certainly, if the Supreme Court is "extremely hesitant to separate siblings when their parents divorce," *Bredemeier v. Jackson*, 689 So.2d 770, 775 (Miss. 1997), a chancellor should not be allowed to disregard the issue of sibling separation as the holding in *C.A.M.F.* would indicate. *See* 972 So.2d at 661 ("[Sibling separation] is not a separate *Albright* factor but a question which the chancellor *may* consider along with the best interest of the child.") (emphasis in original). Moreover, a mandatory, on-the-record discussion of the issue of sibling separation would "lend some degree of transparency to the chancellor's decision process and thereby make

an appellate review as meaningful as possible." *McWhirter v. McWhirter*, 811 So.2d 397, 399 (Miss. App. 2001).

Therefore, if it is reversible error when a chancellor fails to make specific findings as to each individual *Albright* factor, then it should likewise be reversible error when a chancellor fails to make specific findings as to the *Sparkman* factor—i.e., whether any unusual and compelling circumstance exists to warrant the separation of siblings—since the *Albright* and *Sparkman* opinions are, in effect, logical extensions of each other. *Cf. Davidson*, 899 So.2d at 911.

Because the Chancellor failed to make specific findings as to whether there was an unusual and compelling circumstance to dictate the separation of the siblings, the Chancellor committed reversible error. *See Sparkman*, 441 So.2d at 1363. This is especially true considering that Chancellor raised the issue of *Sparkman* himself but never touched upon the subject in any detail. [R.E. at 17-59; T. at 500-42]

Likewise, the Chancellor committed reversible error by making no provision whatsoever—much less any "elaborate provision"—to assure that the A. K. and C. R. would be with their brothers "as much as is reasonably practicable given their residence in separate communities and their attendance at different schools." *Bell v. Bell*, 572 So. 2d 841, 846 (Miss. 1990). At the very least, the Chancellor should have taken into consideration the proximity of the children from their older siblings when creating a visitation schedule, and as such, he should have afforded A. K. and C. R. more opportunity to be around their brothers. Instead, by using the one-size-fits-all "Farese visitation schedule," the Chancellor made no special accommodation for the boys to be together with their older brothers. [R.E. at 12, 52; C.P. 179-80; T. at 531]

Accordingly, Edward D. Moorman prays that this Honorable Court reverse the order of the Chancellor and remand this matter to the lower court for a new trial.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Edward D. Moorman, the Appellant, respectfully requests that this Honorable Court, after a review of both parties' briefs, the record in this case, and the oral argument of the parties, reverse the Chancellor's order to the extent that it grants custody of A. K. and C.R. Moorman to their mother, Rebecca Waldo Moorman, and to the extent that the order's visitation schedule does not provide for A.K. and C.R. to have more time with their brothers, and remand this matter for a new trial because the Chancellor failed to address any unusual and compelling circumstance that would dictate the separation of A. K. and C. R. from the their older brothers in his findings of fact and conclusions of law, and because the Chancellor failed to make provision in his order to assure that the A. K. and C. R. would be with their brothers as much as is reasonably practicable given their residence in separate communities and their attendance at different schools.

Moreover, the Appellant prays for general relief, whether legal or equitable, that this Court may deem meet and proper in the premises.

RESPECTFULLY SUBMITTED, this the 11th day of May, 2009.

By _____
John G. Holaday, Esq.
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CERTIFICATE OF SERVICE

I, Matthew D. Wilson, counsel for Edward D. Moorman, do hereby certify that I have on this date filed a bound original and three (3) bound copies of this *Brief of Appellant* with the Clerk of the Supreme Court. I further certify that I have filed with the Clerk an electronic copy of the Brief of Appellant on CD-ROM.

I further certify that I have filed with the Clerk a four (4) copies of the Appellant*'s Record Excepts*, containing selected portions of the Clerk's Papers, including the Chancery Clerk's docket, the Order under review, and the Court's findings of fact and conclusions of law; said Appellant's Record Excerpts is properly paginated and has a Table of Contents.

I further certify that I have on this date sent a copy of the Brief of Appellant and the Record Except to the following persons via first-class mail, postage prepaid, and/or via overnight delivery:

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