IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL PHILLIPS — APPELLANT

VS. — NO. 2008-CA-02019

SARAH PHILLIPS — APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE
SECOND JUDICIAL DISTRICT OF JONES COUNTY,
MISSISSIPPI – CAUSE NO. 2007-0017

THE HONORABLE FRANKLIN C. McKENZIE, JR., CHANCELLOR, PRESIDING

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

SHERRY L. LOWE
Attorney at Law
Post Office Box 550
109 S. Front Street
Sandersville, MS 39477
601-422-0000
Miss. State Bar #[redacted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL PHILLIPS	APPELLANT
VS.	NO. 2008-CA-02019
SARAH PHILLIPS	APPELLEE

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:

Michael Phillips	Appellant
Terry L. Caves	Attorney for Appellant
Sarah Phillips	Appellee
Sherry L. Lowe	Attorney for Appellee
Honorable Franklin C. McKenzie, Jr.	Chancellor

THIS the 6th day of July, 2009.

Respectfully submitted,

Sherry L. Lowe

SHERRY L. LOWE
Attorney for Appellee

SHERRY L. LOWE
Attorney for Appellee
P. O. Box 550
109 S. Front Street
Sandersville, MS 39477
601-422-0000
Miss. State Bar [redacted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL PHILLIPS	APPELLANT
VS.	NO. 2008-CA-02019
SARAH PHILLIPS	APPELLEE

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:

Michael Phillips	Appellant
Terry L. Caves	Attorney for Appellant
Sarah Phillips	Appellee
Sherry L. Lowe	Attorney for Appellee
Honorable Franklin C. McKenzie, Jr.	Chancellor

THIS the 6th day of July, 2009.

Respectfully submitted,

SHERRY L. LOWE
Attorney for Appellee

SHERRY L. LOWE
Attorney for Appellee
P. O. Box 550
109 S. Front Street
Sandersville, MS 39477
601-422-0000
[redacted]

TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Cases **Page**

Statutes:

II.

STANDARD OF REVIEW

The Court has long held that the standard of review in domestic relations cases is the substantial evidence/manifest error rule. "We will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard." *Thompson v. Thompson,* 816 So.2d 417, 419 (Miss. App. 2002); *Turpin v. Turpin,* 699 So.2d 560, 654 (Miss. 1997).

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

The Appellee concurs with the Appellant's outline of the Nature of the Case, Course of Proceedings and Disposition Below.

B. Statement of Facts

Although the Appellant outlined his Statement of Facts, the Appellee wishes to correct a few items which were erroneously stated in Appellant's Brief.

First, the minor children of the parties were aged 14 (Shayla) and 9 (Samantha) at the time of the trial of this matter.

Although Michael stated that neither party requested joint physical custody in their pleadings, Sarah did testify that she while she would like to have primary custody, she would take joint custody. (T. 222). In fact, Michael's attorney questioned her about testifying at her deposition that she wanted joint custody and now at trial she was requesting primary custody. (T. 254). She reiterated that she wanted either primary or joint custody.

The older daughter, Shayla, did testify that she wanted to live with her father during the week. Although the Appellant states that the Chancellor rejected her preference and did not explain his reasons for doing so as required by statute, the Court did in fact include that as an *Albright* factor and did state that this factor favored the father. (CP 95-96). Samantha was not of an age allowed by law to state a preference since she was only 9 years old at the time of the trial of this matter, and therefore the Court is not required to consider her preference. However, again, the Court did place this factor in the father's list of favorable factors. Since the law has changed, this preference is now simply one of the factors for the Courts to consider and is no longer the only factor to be used by the Court.

Even though both girls testified that they felt safer with their father and in their "house that they had grown up in all of their lives," (Brief of Appellant, pg. 2), Shayla also testified that if her mother got the house in the divorce, she didn't want to stay in the house. (T. 15). Although the girls claim they had a routine at their father's house, they clearly had a routine with their parents prior to the separation when their mother was the primary caretaker. (T 12-14). But, since the mother's visitation time is weekend, the routine is most likely more relaxed than it would be during the week when school is going on and there is homework to do.

While testimony indicated that the girls did have their own bedroom and bathroom at their father's house, the testimony also showed that the house in which their mother resided was one in which both the mother and father had lived early in their marriage. (T. 212-213). Although the house in which Sarah lives is a two-bedroom and one bathroom house (T. 257), Sarah testified that there was no problem with the heat in the house. Sarah stated that the heater

works fine and is a propane heater in the living room. (T. 257). When it is really cold, she has electric heaters they can use. (T. 258).

The Brief of the Appellant erroneously stated that Shayla has been "physically abuse" by her mother. There was an altercation between Shayla and her mother in which both of them fell down and Shayla received a bruised knee. (T. 329-330). When you read the transcript it appears to be nothing more than a normal interaction between a mother and child, but somehow they fell. Shayla even stated "we fell and started rolling." (T. 329). Apparently she hit her knee on a table and this is how she sustained the bruise. This does not constitute physical abuse.

In addition, the incident of nudity by her grandfather was more of an incident of Shayla and her grandfather picking back and forth. (T. 332). Shayla wasn't able to tell how far down his pants went but she says she saw his naked buttocks. However, Shayla's grandmother, Glenda Coats, was also present when this happened, and she stated that the grandfather's pants were not down far, just a little ways, and he didn't pull them down below his butt. (T. 325.)

The incident regarding drinking a beer while driving with the girls in the car, Sarah admitted that she had had a bad day, they were rushing around, and she saw the beer in the refrigerator. She poured about half of the beer in a cup and took it with her but she didn't even drink half of that. (T. 230)

The history of the routine for the children prior to the separation is accurate. Michael testified that when the parties separated several times, he left the children with Sarah (T.135-138). Michael worked for Thermo-Kool at the time he and Sarah got married. (T. 117). Apparently, after that, he got a job working for the railroad, but was injured many times, requiring him to be off for an extended period of time. (T. 117).

From 1990 to 1999, Michael entered into a series of businesses. The Car Wash, a self-serve car wash, was opened and apparently operated the entire nine-year period. After that, Michael sold this business to his sister. Another business, Cutter's Outdoor Power Equipment Sales and Service, failed for "lack of profit margin." (T. 119). Michael sold it although he didn't remember the man's name, but they bought the inventory. The next business, Soso Diesel Repair, is the business where employees left him for better paying jobs, so he had to close it down and it failed. (T. 119). M & S Quick Stop was another business that Michael and Sarah operated for about a year and a half. Michael testified he walked out of it, but upon further questioning, he testified it wasn't enough of a profit margin for the way it was. (T. 120).

Another business was a mobile home set up business that did mobile home repairs. It closed according to Michael so he could take another job with better benefits, but the business was not a flop. (T. 120). After that, he worked for several other employers. (T.124-125). Sarah has worked outside the home for most of her marriage, working minimum wage jobs early in the marriage for different employers, but has worked at Wayne Farms for the past nine (9) years. (T. 262-263, Ex. 38).

The history of the purchase of the real property by the parties is accurate.

The Brief of Appellant alleges that Sarah wasted money and marital assets (Brief of Appellant (pg. 4). However, testimony by both Michael and Sarah show that Michael had numerous businesses which failed or didn't prosper, and during that time, Sarah's income was keeping them afloat. Sarah was responsible for paying the bills as evidenced by her signing most of the checks in their joint account. (T. 267). Sarah admitted that the primary problem

was they had more bills than they had income and this was definitely a source of conflict in the marriage. (T. 268)

Sarah agrees that she and Michael did a transaction regarding deeds and their property, but she testified that she "signed because he told me to sign it." (T. 261).

The issue with regard to the transaction has been brought before the Chancellor and the Chancellor found that Michael overreached in this transaction, and that Sarah would not have given up so much property in exchange for such a small amount of property, and only a one-third (1/3) interest therein at that. Sarah testified she had no complaint with Wayne Thompson and how he handled the transaction and that he treated her fairly and honestly. (T. 261). However, Wayne Thompson might not have been given all the details, and he was certainly not hired to handle the divorce.

During the marriage the parties borrowed money from both sets of parents. (T. 267). With regard to the $20,000.00 borrowed by Michael from the Bank of Jones County, the Court found that $12,201.65 of this debt was marital because that was the balance of the loan on the date of the separation. (T. 295). While Michael contends that Sarah wasted assets during the marriage by making payments on her parents' loans with Central Sunbelt Federal Credit Union without Michael's knowledge, Sarah testified that she was actually paying her mother back money she had borrowed from her. (T. 269).

Although Sarah did have bank statements mailed to her parents' house, it was not to deceive Michael but simply to keep down arguments. (T. 273). However, Michael testified that he had credit card statements and other bills sent to his sister's house. (T.59).

Michael admitted to having an affair with Sherry Lynn Jones. (T. 129). Sarah did begin a relationship but it was well over a year after having been separated from Michael. In addition, Michael has been seeing Lisa Ethridge since the separation of the parties and has had her around the children. (T. 211). Therefore, both parties are on the same level with regard to the issue of adultery.

C. Summary of the Argument

The Chancellor did not err in his equitable distribution of assets and debts of the parties. The Court did hold open the case for a long time to allow Michael to verify whether the loans with his parents were a valid debt. In addition, the chancellor did state that even if it was a valid debt, it might have been barred by the statute of limitations.

The Court did classify and equitably divide the loan of $20,000.00, by finding that only $12,201.65 was a marital debt. (CP 136). Although Sarah admitted she entered into a pre-separation agreement, the chancellor found that she was taken advantage of by Michael since Sarah was still trying to save the marriage but Michael apparently knew a divorce was in the near future and took that opportunity to try to slant the property issues in his favor. Sarah only received a one-third interest in property valued at $800.00, and this property was too small to have a house or even a mobile home on. Further, Michael was to remove her name from a $14,000.00 debt. So, the value of her consideration was exceedingly less than the value of the property he received. She did this basically because he told her to do it. She was unaware of the consequences to her financially but was simply trying to work things out with her husband.

The court did not err in awarding joint physical custody of the minor children. The chancellor did in fact take into consideration the 14 year old daughter's preference by assigning

that factor to the father in going through the *Albright* factors. Further, there was testimony from Michael that he had had an affair in 1995, and Sarah testified that Michael currently had a girlfriend who had been around the children. So, clearly the court had sufficient evidence to make that finding.

As to the living conditions, the Court did consider this and in fact took into consideration that Michael and Sarah had lived together in the house that Sarah now occupies earlier in their marriage and that it was okay for them to live in. The fact that the girls have to share a room does not constitute a bad environment, and their mother is doing the best she can under the circumstances. The chancellor made his decision to grant joint physical custody apparently with the intent that both parents could have equal time with the children and the children could have equal time with each parent so the relationships could be nurtured and maintained.

D. LEGAL ARGUMENT

1. The Chancellor did not err in his equitable distribution of assets and debts of the parties.

A. Sarah's alleged misconduct during marriage

Previously in the statement of facts, we mentioned that there was testimony regarding Michael's affair in 1995 with Sherry Lynn Jones, as well as his relationship at the time of the trial with Lisa Ethridge. (T. 129, 211) Michael's private investigator followed Sarah in September of 2007, which is 18 months after the parties separated in March of 2006. Additionally, the private investigators who testified stated that Sarah went to the home of Chuck Odom, but left before midnight and didn't spend the night, and they never saw the children with her. Clearly, she did not have the children around the new man in her life, but Michael did have the children around his girlfriend. (T. 211).

Therefore, the court properly found that this factor was neutral since there was sufficient evidence before it to make that finding.

B. Pre-separation agreement

The Appellant alleges that the chancellor erred when he found that Michael committed fraud or intended to deceive Sarah with regard to the exchange of deeds and assumption of debt. (Brief of Appellant, pg. 9). However, Sarah believes that the Court found that Michael engaged in overreaching and that is why he ruled as he did.

In all of the cases cited by Michael in supporting that a prior distribution of assets by agreement of a divorcing couple is relevant to classification and division of property, there are some serious distinguishing facts between those cases and the instant case.

In *Thompson v. Thompson,* 816 So.2d 417, 419 (Miss. Ct. App. 2002), the issue revolved around two investment accounts, one held in the name of Mr. Thompson solely and the other held in the name of Mr. Thompson and his daughter. Mr. Thompson and his son-in-law purchased a tract of land and developed it into Creekwood Estates. They operated it as partners in the development of the subdivision and sale of lots. All dividends received by Mr. Thompson were divided equally between Mr. Thompson and his wife. Both parties testified to that fact. Mr. Thompson took his half of the dividends and put them in the investment accounts. What dividends he didn't put in the investment accounts, he used to pay marital obligations so that at the time of the trial, the parties had no debts. Since the source of the money in these investment accounts was Mr. Thompson's half of the dividends, the court found that it would not be equitable to further divide them simply because Mr. Thompson had "exercised sound economic

judgment in managing these funds." *Id.* at 419. Therefore, the court upheld that action to be a prior division of assets and did not further divide or set aside that agreement.

In *Childs v. Childs*, 806 So.2d 273, the issue was that Mrs. Childs basically embezzled money from the family farm, diverted $264,750.00 in family assets to herself, and in order to pay back her husband, she executed a quitclaim deed to him of her interest in their farm. The court held that this was "necessitated by Mrs. Childs' misappropriation of family funds and resolved the issue of equitable distribution." *Id.* at 274. While Mrs. Childs argued that the family ultimately benefitted from her expenditures (as outlined in the cases), Mr. Childs argued to the contrary. This of course brought up the issue of credibility of witnesses.

> "Such a conflict in testimony presents a classic question of credibility, which is to be resolved by the chancellor. *Brawley v. Brawley*, 734 So.2d 237, 241 (Miss.Ct.App.1999); *Mixon v. Mixon*, 737 So.2d 408, 411 (Miss.Ct.App.1999).

Id. at 275.

Further, the Court found in that case that since Mrs. Childs received about four times her entitlement under equitable distribution, clearly the chancellor did not abuse her discretion and that the quitclaim deed signed by the wife to the husband "adjusted the equities between the parties." *Id.* at 275.

Finally, in *Weathersby v. Weathersby*, 693 So.2d 1348, 1353 (Miss. 1997), the parties obtained a divorce on the grounds of irreconcilable differences on March 8, 1990, and apparently indicated that they had divided their personal property. On September 5, 1990, they entered into a handwritten agreement on four (4) pages of a legal pad with the wife's name at the time of one page and the husband's name at the top of the other page, and both parties having signed the same. Subsequent to that, the wife petitioned the court for an equitable division of property, but

the Court held that the property had been divided pursuant to the hand-written agreement by the party, even though the agreement was subsequent to the divorce of the parties. Therefore, that case is completely different from the instant case and does not apply.

In the instant case, the actions of Michael fall under the category of overreaching. The Court states that

> "[o]verreaching occurs when an agreement: (1) 'is so one-sided and unfair that it could never be considered "adequate and sufficient,"' and (2) 'resulted from an inequality of bargaining power or other circumstances such that there was no meaningful choice on the part of the disadvantaged party.' *In re Dissolution of the Marriage of De St. German*, 977 so.2d 412, 419 (Miss.Ct.App.2008).

Price v. Price, 5 So.3d 1151, 1156 (Miss.App.2009).

In connection with this transaction, Michael was the driving force behind the deed. Michael called Wayne Thompson, told Wayne what he wanted, told Sarah to go to Wayne's office to sign the deed. In fact, Sarah testified that she signed the deed in Wayne's office. But Terry Caves, Michael's attorney, reading from Sarah's deposition in her answer to his question, "And you signed it of your own free will, voluntarily; is that correct?" read her answer: "In his office, I did. I had talked to Michael several times about it and what the point was." (T. 260.) Clearly Sarah was confused about the reason why they were doing this transaction. Later in her testimony, Michael's attorney questioned her about keeping the one acre and the house in both her name and Michael's name, and her answer was, "I didn't know – I mean, I signed because he told me to sign it." Again, this shows that she simply followed his direction even though she wasn't sure what was going on.

The appraised value of the land not including the house and one acre is $62,500.00. Her one-half (½) interest would be worth $31,250.00. The value of having her name removed from

the Bank of Jones County loan would be half of the note, or approximately $7,000.00. Then, her one-third (1/3) interest in the .5 acre of land conveyed to her and the two (2) daughters is $266.67, which testimony shows the total value is $800.00. So, it appears that she traded $31,250.00 of property for $7,266.67 of value. The amount she would get is over four (4) times LESS than what she would receive from the value of her one-half (½) of the real property. Clearly this is unfair and not "adequate and sufficient" and if the court was to decide the distribution, she would not have received this type of division. Further, in Michael's attorney's questioning of her, Sarah admits that she didn't make any attempt to have the deed set aside until the divorce was filed, which confirms that at that time, she received legal advice about the transaction not being fair and equitable. This would show that there was no meaningful choice on the part of the disadvantaged party, thus meeting the second prong of the overreaching law.

Therefore, the court did not err in making its ruling regarding the transaction made prior to the filing of the divorce and by setting that transaction aside. The Appellant cited *Weathersby* again which has clearly distinguishable facts from the instant case.

C. Michael Phillips' parents' loan

With regard to the loan to Michael Phillips' parents, the Court addressed this issue by finding that there was no promissory note for the $40,000.00. Additionally, in his 8.05 Financial Statement, Michael lists a $15,000.00 debt to Hartley Phillips, his father, and that is the only debt he lists. (Ex. 1). He does not list this debt at $40,000.00, and it is only at trial and in his testimony does this amount now become $40,000.00.

There was a promissory note for the $15,000.00, with several payments having been made toward that debt. (Ex. 6). The Court finally made a ruling in his September 30, 2008, Order that "in the event the indebtedness claiming by Michael Phillips to his parents of $15,000.00 is a valid debt, then Sarah D. Phillips shall be responsible for one-half of said indebtedness." (CP. 125.)

With regard to the statute of limitations, the instant suit is not the proper venue in which to assert the affirmative defense of statute of limitations. Whenever the holder of the note attempts to bring suit against the makers of the note, that would be the time for the makers of the note to assert that affirmative defense. That would appear to be why the Court made its comment regarding in the event this was a "valid debt," meaning that if the holders of the note sued the makers of the note, and that suit was not dismissed under a claim of invalid due to the running of the statute of limitations, then Sarah D. Phillips would be responsible for one-half (½) of that debt.

Since this is a debt owed to the parents of Michael, it would appear that the Court wanted to make sure that the holders of the note (Michael's parents) sought payment from both Michael and Sarah and would not simply be asking Sarah to pay her half by subtracting her "half" of this debt from the equity, and then not seek repayment from Michael, thereby giving Michael an unfair financial advantage in this way.

D. The Chancellor did not err in his classification and division of the marital debt in the sum of $20,000.00.

In his testimony, Michael admitted that a portion of that money was used to build a shed on the property. (T. 47-48). Additionally, that money was used to pay off some family bills. It appears that one of the family bills Michael used this money to pay off was the Bank One credit

card when he negotiated a settlement and paid $3,800.00. (T.48). If that is the case, the Court included that $3,800.00 in his list of debts that are assessed to Sarah. (CP 107). Therefore, to include the full $20,000.00 on this debt, as well as the $3,800.00 would unfairly double up this debt on Sarah.

Further, Michael testified that he used some of this money to build the shop. (T. 47-48). Therefore, it would appear that the Court assessed the $12,201.65 which was the payoff on the date of separation (T. 294-295), the Bank One credit card payoff ($3,800), and then assessed the remainder for use for building this shed/shop. This would apparently come to approximately $20,000.00, and the Curt apparently felt this was sufficiently designated as marital, classified and properly divided.

Additionally, there is much testimony that Michael entered into a series of businesses which were not successful and which didn't make money, at which time they relied on Sarah's income to live. (T. 197). Clearly, the loss of the money contributed into these businesses and the failure of these businesses was a large contributing factor to the financial problems with Sarah and Michael (T. 197). Michael tends to keep blaming their financial problems only on Sarah, but both parties contributed to their financial difficulties.

2. The Chancellor did not err in awarding joint physical custody of the parties' minor children.

The *Albright* factors have long been the standard for courts to use to in determining custody for minor children. *Albright v. Albright* 437 So.2d 1003, 1005 (Miss. 1983). In each case, the Court must use these factors to determine who should get custody of minor children by assessing these factors and determining which factors favor which parent.

A. On-the-record finding regarding Shayla's preference

This issue seems to be a moot point. The Court did state in his opinion that Shayla testified that she wished to live with her father, and that the younger sibling did not testify as to any preference. Clearly the younger child, who was 9 years old at the time of the trial, was not old enough for the court to be required to consider her preference. In its Opinion of the Court, the chancellor stated that "[s]o that factor -- insofar as the older child – would favor a custody determination to Michael." So clearly the Court did honor the child's preference.

At one point in time, the law was such that it took only a child twelve years old and over to state his or her preference, and the Court would "automatically" award custody as requested by the child, but in the event the court did not, it would have to state on the record the reason for not honoring that preference. The current state of the law, Miss. Code Ann § 93-11-65 (1972 as amended), states:

> Provided, however, that if the court shall find that both parties are fit and proper persons to have custody of the children, and that either party is able to adequately provide for the care and maintenance of the children, the chancellor **may** consider the preference of a child of twelve (12) years of age or older as to the parent with whom the child would prefer to live in determining what would be in the best interest and welfare of the child. The chancellor shall place on the record the reason or reasons for which the award of custody was made and explain in detail why the wishes of any child were or were not honored. (Emphasis added).

Miss. Code Ann. § 93-11-65(1)(a).

In the newer version of the law, a child's preference may be considered by the Judge; it is not an absolute, "automatic" given that the child's preference will be granted. This law was changed in 2006, and *Polk v. Polk*, 589 So.2d 123 (Miss. 1993), was an older case prior to the change in the law. In *Polk*, the Court denied the child's preference and did not give a reason on

the record. Therefore, the case was reversed and remanded for further consideration on the custody issue.

The instant case is distinguishable because the Court did take into consideration the child's preference in assigning that factor to Michael. Further, the Chancellor did given his reasoning in his opinion:

> This appears to be a classic case in which the Court should consider – and does consider – an award of joint physical custody of these two children. They need both their parents in their lives. At this point in time, I think the better thing to do for them and what would be in their best interest would be to provide for a joint physical custody arrangement where they would be with their father for a week and be with their mother for a week.

(CP. 96)

B. Custody award on an alternating basis

Miss. Code Ann. § 93-5-24 (1) (a) allows custody to be awarded with physical and legal custody to both parents jointly pursuant to subsections (2) through (7). In subsection (3), the statute provides: "in other cases, joint custody may be awarded, in the discretion of the court, upon application or one or both parents." *Miss. Code Ann. § 93-5-24(3) (1972 as amended).*

Clearly, the Court was well within its discretion to award joint physical custody of the minor children to Michael and Sarah. In going over the *Albright* factors, the Court actually found that more factors favored Sarah than Michael. Under the Opinion of the Court, the factors were assessed as follows:

	Factors	Who favors
1.	Health and sex of child:	Sarah
2.	Which parent had the continuity of care prior to the separation of the parties:	Sarah
3.	which parent had the best parenting skills	Neutral
4.	Which parent has the willingness and capacity to provide primary child care	Neutral
5.	Each parent's employment and their responsibilities in that employment	Neutral
6.	Physical and mental health and age of the parents	Neutral
7.	Emotional ties between the child and parents	Neutral
8.	Moral fitness of the parents	Neutral
9.	The home, school and community record of the child	Neutral
10.	If the child is twelve years old or older, the child's preference	Michael
11.	The stability of the home environment and employment of the parents	Neutral
12.	Any other factors relevant to the parent/child relationship	N/A

(CP. 93-96)

However, rather than simply award primary physical custody to Sarah, the Chancellor awarded joint physical custody so the children could spend time equally with both parents. This

was well within his discretion, and based on the above assessment of factors, the Court did not abuse his discretion in this matter.

The Court heard testimony from both parties regarding the moral misconduct of both parties. Michael admitted that he had an affair during the marriage with Sherry Lynn Jones. In addition, there was testimony that he currently has a girlfriend, Lynn Ethridge, which was never disputed, and that this girlfriend had been around his children. Therefore, the Court had sufficient evidence to make the determination that both parties had "significant others" and, therefore, there was no error on the Court's part in connection with this issue.

E. CONCLUSION

The issues outlined by Michael in this Brief are all issues which were properly considered and addressed by the Court.

1. The $20,000.00 Bank of Jones County debt was considered and addressed by the Court by assessing $12,201.65 as the balance of the loan at separation and, $3,800.00 of that as Bank One credit card bill, both amounts assessed to both parties; the remainder was apparently assessed to the cost of the shed/shop built by Michael on the property which he now owns.

2. The pre-separation disposition was overreaching on the part of Michael by giving him over four (4) times the value of property to the alleged consideration received by Sarah; Sarah was not given independent legal advice until such time as she hired her divorce attorney, who immediately saw this transaction for what it was and sought to have it set aside.

3. Shayla's preference was considered by the Court, but under the current law, is only a factor to be considered by the Court and it not an absolute directive that the Court must follow. Her preference was taken into consideration and assessed to the father under the *Albright* factors, but the Court found that a joint physical custody arrangement would be in the children's best interest.

4. Much is made of Sarah's "adultery," although her relationship with Chuck Odom came eighteen (18) months after separation of the parties, and therefore, there is no evidence that she committed adultery while the parties were living together. In addition, there was testimony that Michael had committed adultery during the marriage with Sherry Lynn Jones, and there was undisputed testimony that he currently had a girlfriend who had been around the children. Sarah's friend Chuck Odom has not been around the children. The Court weighed those facts and found them to be somewhat a "wash" and therefore was a neutral factor under *Albright*. The Court was aware of the previous custodial arrangement and it can only be presumed that he took that into consideration when making his decision. The Court properly applied the *Albright* factors, and while based on his assessment, custody could have gone to Sarah, he made the ruling that joint physical custody was in the children's best interest.

The Chancellor was in the best position to determine credibility of the witnesses, demeanor of the parties, review of the exhibits, and was on hand during all proceedings. Therefore, he would be the best person to make a proper ruling on the issues in this case. Based

on the facts of this case, the pleadings, the exhibits, the testimony, and everything presented in Court, the Chancellor did not abuse his discretion in ruling on these issues, and therefore, his decisions should be affirmed.

Respectfully submitted,

SARAH D. PHILLIPS.

BY: Sherry L. Lowe
SHERRY L. LOWE

SHERRY L. LOWE
Attorney for Appellee
P. O. Box 550
109 S. Front Street
Sandersville, MS 39477
601-422-0000
Miss. State Bar [redacted]

CERTIFICATE OF SERVICE

I, SHERRY L. LOWE, attorney for Appellee, do hereby certify that I have this day mailed, by United States Mail, first class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLEE** to the Hon. Terry L. Caves of Caves and Caves, PLLC, attorney for Appellant, Post Office Drawer 167, Laurel, MS 39441-0167; and Honorable Franklin C. McKenzie, Jr., Chancellor, Post Office Box 1961, Laurel, Mississippi, 39441, their usual post office address.

THIS the 6th day of July, 2009.

Sherry L. Lowe

SHERRY L. LOWE