

SUPREME COURT OF MISSISSIPPI
Case # 2009-CA-01019

BOBBIE SUE KIMBROUGH

APPELLANT

VS.

ROBERT EARL KIMBROUGH

APPELLEE

APPEAL FROM THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

LEE COUNTY CHANCERY CAUSE NO. 07-1034-41-H

BRIEF OF APPELLANT, BOBBIE SUE KIMBROUGH

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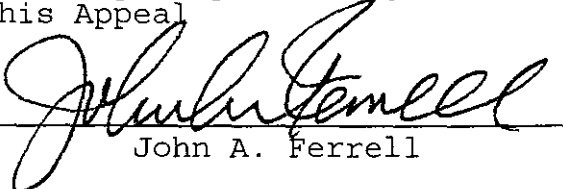
ROBERT EARL KIMBROUGH

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CERTIFICATE OF INTERESTED PERSONS

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

1. John A. Hatcher, Chancery Court Judge
First Chancery District, State of Mississippi
and presiding Judge in this case
2. Bobbie Sue Kimbrough,
Plaintiff/Appellant
3. Robert L. Kimbrough,
Defendant/Appellee
4. Honorable Jak M. Smith,
Attorney representing Robert L. Kimbrough
at trial
5. Honorable Mark Shelton and Honorable Jana
Dawson, Attorneys representing Bobbie Sue
Kimbrough at trial
6. John A. Ferrell & J. Deborah Martin of
Ferrell & Martin, P.A., Attorneys representing
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I.

STATEMENT OF THE ISSUES

A. Whether or not the Chancellor committed reversible error in failing to award Bobbie any interest in the Motorcycle Doctor, the business of Robert.

B. Whether or not the Chancellor committed reversible error in awarding only Forty-Four Hundred Dollars (\$4,400.00) to Bobbie Sue Kimbrough for her interest in the martial home.

C. Whether or not the Chancellor erred in failing to consider all evidence elicited during the trial of this case, including the evidence presented before the Honorable Talmadge D. Littlejohn.

D. Whether or not the Chancellor committed reversible error in failing to correctly apply the Albright factors to the evidence in this case and awarding the physical custody of the minor child of the parties to Robert Earl Kimbrough.

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II.

STATEMENT OF THE CASE

A. Nature of the Case

This Appeal involves a Judgment rendered in a divorce case involving Bobbie Sue Kimbrough, Plaintiff/Appellant (hereinafter referred to as Bobbie) and Robert Earl Kimbrough, Defendant/Appellee (hereinafter referred to as Robert) wherein the Court made provisions for the custody of their child and for division of marital property.

B. Course of the Proceedings
and Disposition in the Court Below

On July 17, 2007, Bobbie filed a Complaint for Divorce, Child Custody and Other Relief against Robert in the Chancery Court of Lee County, Mississippi. (C.P. 006-016) Robert filed an Answer and Cross-Claim to said Complaint. (C.P. 075-090) Both parties sought a divorce and custody of their minor child, Kaitlin Suzanne Kimbrough, (hereinafter referred to as Kaitlin), date of birth, July 30, 2003. (C.P. 007) The case was assigned to the Honorable Talmadge D. Littlejohn, Chancellor, who entertained a request for

emergency custody and Temporary Restraining Order relative to Kaitlin. The Chancellor entered an Order granting Emergency Custody and a Temporary Restraining Order to Bobbie on July 18, 2007. (C.P. 036-039)

A hearing on Temporary Features was held on August 29, 2007, before Judge Littlejohn who heard extensive testimony at that time. However, prior to rendering a decision on Temporary Features the parties announced that they had resolved those issues and a Temporary Order was entered on August 30, 2007, setting forth the agreement of the parties. (C.P. 096-098) Said Order provided that the parties share joint legal custody of Kaitlin with no finding of who should have physical custody. However, the net effect of the Temporary Order was that Bobbie had the child considerably more time than did Robert. (C.P. 096-098)

The matter was set for trial on the merits for January 22, 2008, before Chancellor Littlejohn. The parties filed a Consent for Divorce and allowed the Judge to decide the issues concerning property and custody. (C.P. 164-167) At that hearing some 154 pages of proceedings were held at which several witnesses testified, including the rather extensive testimony of Robert. (Tr. 137-294) As the case could not be completed on January 22, 2008, Court was adjourned for that day. (Tr. 291) Prior to any further hearings, Chancellor Littlejohn recused himself by Order dated March 26, 2008, and recorded March 27, 2008. (Tr. 170) The

case was re-assigned to the Honorable John A. Hatcher and the case proceeded under his direction.

After assignment, testimony was taken on the merits of the case on July 1, 2008, November 18, 2008, January 13, 2009, January 14, 2009, and April 20, 2009. (R.E. 9; C.P. 213) At the conclusion of the testimony, Judge Hatcher rendered his decision contained in the "Final Judgment for Divorce - Irreconcilable Differences" entered on May 1, 2009, and filed for record on May 4, 2009. (R.E. 8-38; C.P. 212-242)

In said Final Judgment, Judge Hatcher awarded the parties joint legal custody but granted physical custody of Kaitlin to Robert. (R.E. 27; C.P. 231)

The Chancellor divided what he determined to be the marital assets. He awarded Bobbie 2.6% of the net equity in the marital home (R.E. 22; C.P. 226) which he awarded to Robert. (R.E. 29; C.P. 233) Robert also received 100% of the business. (R.E. 29; C.P. 233)

Finally, there is no indication from the record that Judge Hatcher had a transcript of the testimony elicited before Judge Littlejohn and therefore he did not consider that testimony.

These are the issues on appeal.

C. Statement of Facts Relevant to
the Issues Presented for Review

Bobbie and Robert were married on April 12, 2002. (C.P. 6)

One child was born to their union, namely: Kaitlin Suzanne Kimbrough, date of birth, July 30, 2003. (C.P. 7)

Bobbie and Robert finally separated on July 13, 2007. (C.P. 6)

The Temporary Order entered on August 30, 2007, awarded Bobbie more time with Kaitlin than Robert (R.E. 5-7; C.P. 96-98) and the parties operated under that Temporary Order until the entry of the Final Judgment by Judge Hatcher on May 4, 2009. (R.E. 8-38; C.P. 212-242)

Even though she had custody of Kaitlin for considerably more time than did Robert between the entry of the Temporary Order and the entry of the Final Judgment, Robert never paid any support to Bobbie for Kaitlin. (Tr. 390)

During the marriage, Robert was physically abusive to Bobbie on several occasions. (Tr. 393, 403-405, 411, 413-414)

During the term of the marriage, Robert had a serious drinking problem, drinking anywhere from six to twelve beers daily. (Tr. 408, 410)

When Robert found out that Bobbie was pregnant, he did not want to have the child and tried to get Bobbie to have an abortion. (Tr. 394)

The parties separated for a while due to the pregnancy and Robert's not wanting the child. (Tr. 396)

Robert would drink beer regularly in Kaitlin's presence. (Tr. 409)

Robert admitted drinking regularly during the marriage. (Tr. 307)

Robert admitted drinking and driving with Kaitlin in the car on several occasions. (Tr. 307)

Bobbie has another child, Bobby Andrew Phillips, (hereinafter referred to as Drew), date of birth, September 21, 1995. (Ex. 5)

Kaitlin lived every day of her life before the separation with her brother Drew and they have a very close relationship to each other as testified to by both Robert (Tr. 310) and Bobbie (Tr. 392).

Robert owns a business where he repairs motorcycles (Tr. 377)

He regularly lies to the Federal and State Government on his income tax returns about his true income. (Tr. 323-325) Robert also mis-represented to the Court his income and initially misrepresented to the Court his being untruthful to the government as well. (Tr. 322-323)

Robert acknowledged that the main reason that he wanted custody of Kaitlin was due to Bobbie's marijuana use. (Tr. 302)

Bobbie has not smoked marijuana since the date of separation. (Tr. 407)

Robert has no proof that Bobbie has been smoking marijuana since the separation. (Tr. 304)

Bobbie passed all drug tests administered to her. (Tr. 302)

Robert has another child with whom he is not very close, only seeing that child approximately one time per year and talking to him only every three or four months. (Tr. 313-314)

Bobbie was the primary financial supporter of the family during the term of the marriage, (Tr. 391, 431-433) a fact admitted to by Robert. (Tr. 325, 340)

Robert always reported less than Five Thousand Dollars a year in income on his tax returns. (Tr. 325)

The house that the parties jointly owned belonged to Robert prior to the marriage. (Tr. 430)

The parties borrowed some \$55,000.00 to renovate the home after the marriage (Tr. 375)

Both parties paid \$200.00 a month until the separation on the note incurred to renovate the marital home. (Tr. 375)

While Bobbie was supporting the family, what money Robert did earn he reinvested back into his business and bought tools and equipment for the business. (Tr. 432)

Robert did not have an appraisal as to the value of the house at the time of the marriage. (Tr. 375)

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III.

SUMMARY OF THE ARGUMENT

Bobbie submits that the Chancellor below committed reversible error in several particulars in this case.

First, the Court failed to award Bobbie any interest in the Motorcycle Doctor. While this was the business of Robert prior to the marriage, throughout the course of the marriage, Bobbie's economic and non-economic contributions to the marriage enabled that business to continue. Further, marital funds were utilized to purchase tools and equipment for that business while Bobbie was providing the primary financial support to the families needs. Some of the income from this business did, in a minimal way, help support the family and therefore, this asset became a marital asset and Bobbie should have been awarded an equitable interest therein.

As to the marital home, the Chancellor found this to be a marital asset though it was owned by Robert prior to the marriage. However, the Court awarded her only \$4,400.00 which equaled her contributions to the payments on the note for the renovations of

this home, all of which took place after the marriage. This amounts to only 2.6% of the \$166,000.00 equity that the Court determined was present and is grossly inadequate and manifest error. Again, the economic and non-economic contributions of Bobbie to the marriage, the primary responsibility for the rearing of the child and other Ferguson factors show that this award was grossly inadequate and certainly not equitable.

Part of this trial was held before Talmadge D. Littlejohn prior to his recusal. A transcript of the testimony elicited before Judge Littlejohn was apparently not available to Judge Hatcher from a review of the record and therefore, he did not consider the testimony of the four witnesses who testified prior to his involvement in the case. This evidence was part of the proof in this case as it addressed everything from custody to division of assets. This case should be reversed and remanded with instructions that the Chancellor consider this testimony along with the other testimony presented before him.

Finally, and most importantly, the Chancellor committed reversible error in this case in failing to award the primary physical custody of the minor child of the parties to Bobbie. The Court's analysis of the Albright factor did not include a correct application of those factors to the facts of this case which is manifest error and shows that the Court did not apply the correct legal standard to those factors. Of primary importance is the failure of the Judge to give proper consideration to the fact that

the minor child, Kaitlin, has a brother, Drew, and that the net effect of the Chancellor's custody award is to separate those siblings, contrary to the law.

For all of the above reasons, Bobbie requests that this Court reverse and remand this case for further hearings on those matters relative to division of marital assets and reverse and render the case so as to award her the primary physical custody of Kaitlin. In the alternative, the Court should reverse and remand the case for further proceedings on the issue of custody with instructions for the Chancellor to consider the testimony elicited before Judge Littlejohn.

IV.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review in a domestic relations case is stated in Foster v. Foster, 988 So. 2nd 779, ¶4 (Miss. App. 2000) as follows:

The Standard of Review employed by this Court in domestic relations cases is abundantly clear. Chancellors are vested with broad discretion and this Court will not disturb the Chancellor's findings unless the Court was manifestly wrong, the Court abused its discretion or the Court applied an erroneous legal standard.

This same standard is employed in all aspects of the domestic relations case including the issue of custody of children. Passmore v. Passmore 827 So. 2nd 747, ¶5, (Miss. Ct. App. 2002). It has also been held that in cases pertaining to custody of a minor child, the paramount consideration is the best interest of the child. Sellers v. Sellers 638 So. 2nd 481, 485, (Miss. 1994)

B. ISSUES FOR APPEAL

1. The Chancellor committed reversible error in failing to award Bobbie any interest in the Motorcycle Doctor, the business of Robert.

The Chancellor included a chart in the Final Judgment wherein he listed by description the property of the parties, whom he perceived to be the owner of that property, the value, any liens that might be against the property, the equity in the property and

the marital classification. (R.E. 14-17; C.P. 218-221) Robert's business, the Motorcycle Doctor, is listed as item two in the Judgment. Robert is shown as the owner, the value is set at \$100,000.00 as per Robert's testimony (Tr. 377) the lien is \$0.00 and the equity is \$100,000.00. (R.E. 14; C.P. 218) The Court classified this as pre-marital/non-marital property and made no award to Bobbie of any interest therein. (R.E. 29; C.P. 233)

While it is true that Robert owned this business prior to the marriage, the Chancellor failed to take into consideration the substantial contributions of Bobbie towards the financial stability of this family and further failed to consider that marital funds (income) were utilized to not only allow this business to continue but to purchase tools, equipment and other assets for it. (Tr. 431-432) The testimony was uncontradicted by Robert that his business income was only some \$4,500.00 to \$5,000.00 annually while Bobbie's income was between \$23,000.00 and \$24,000.00 per year. It is therefore obvious who was paying most of the bills for the family which allowed Robert to reinvest any profits from the business back into the business (Tr. 432) and also to buy tools and equipment during the marriage for his shop with marital funds. (Tr. 432)

Applying the equitable distribution factors set forth in Ferguson v. Ferguson, 639 So. 2nd 921, 929, (Miss. 1994) the Chancellor must first classify the parties' assets as marital or non-marital based upon the Court's decision in Hemsley v. Hemsley

639 So. 2nd 909, (Miss. 1994). Then the Chancellor is to value and equitably divide the marital property employing the Ferguson factors as a guideline in light of each parties non-marital property. King v. King 767 So. 2nd 830, ¶18, (Miss. App. 2000) While the business may have originally belonged to Robert, when it was brought into the marriage the use of funds therefrom, the economic contributions of Bobbie to the family as a whole and the utilization of marital funds to purchase tools and equipment for that business clearly entitled her to some equitable division of that business as it lost its classification as non-marital property.

Further, the non-economic contributions of Bobbie to the marriage were similarly not considered by the Chancellor. The testimony is clear that during this marriage Bobbie took care of the household including having the majority of the responsibility for the nurturing of Kaitlin. (Tr. 416-418) As noted in the King decision at ¶17-18, the Court of Appeals held that it is settled that non-economic domestic contributions are of equal value to financial contributions when assessing marital assets. Flechas v. Flechas 724 So. 2nd 948, ¶11, (Miss. Ct. App. 1998)

Therefore, Bobbie requests that the Court reverse and remand this case with the directions that the Chancellor make a determination first as to the classification of the business as marital and secondly that the Court value and make an equitable division thereof.

2. The Chancellor committed reversible error in awarding Bobbie only 2.6% of the equity in the marital home (\$4,400.00).

The marital home of the parties was listed in the Opinion as Property 1. (R.E. 14, C.P. 218) Though owned by Robert before the marriage, it was titled in both names. (Tr. 430) The Chancellor averaged the values given by each party to arrive at a value of the marital property as \$220,000.00. (R.E. 14; C.P. 218) He deducted a debt to Renasant Bank of \$54,000.00 leaving equity of \$166,000.00. (R.E. 14; C.P. 218) The Court then classified the property as marital due to commingling but only awarded Bobbie the amount of money she had paid on the debt to Renasant Bank, \$4,400.00. This amounted to only 2.6% of the equity in the marital home. This is grossly inadequate and is manifest error.

As previously noted, even though Robert owned this house prior to the marriage, the parties went together and borrowed some \$55,000.000 to renovate the home. (Tr. 375) Both parties contributed equally to those monthly payments on that renovation loan until the separation. (Tr. 375) The Court correctly classified the marital home as a marital asset but committed reversible error when he only awarded Bobbie 2.6% interest therein, basing that award on the amount of payments that Bobbie had made. (R.E. 14, C.P. 218)

As previously noted, in order to make the Ferguson analysis for equitable division, it is necessary for the Court to consider both economic and non-economic contributions to the acquisition or

maintenance of the assets. King at ¶17-18 The \$200.00 per month was not the only economic contribution that Bobbie made to the family finances as it is clear from the record, as previously noted, that she was the primary "bread winner" in this family, a fact admitted to by Robert. (Tr. 325) As will be more fully set out herein, Robbie was also the primary caregiver for Kaitlin both before and after the separation. (Tr. 415-417) In addition to being the primary "bread winner", Bobbie shared in the domestic duties around the house, cooking, cleaning, washing the clothes, etc., all while working a full time job at Mac's Tire Center. (Tr. 415-416) Mr. Kimbrough's more flexible work schedule would not have been feasible but for Bobbie's regular income from Mac's Tire being available to pay the bills. (Tr. 325)

The case of Flechas v. Flechas, 791 So. 2nd 295 (Miss. App. 2001) presents a good discussion of not only making a determination of what is and what is not a marital asset, but is an excellent discussion of the concept of commingling which Judge Hatcher found to be the case with the marital home. Flechas at ¶22 However, the analysis employed beyond that point by the Chancellor below in determining what share to award to Bobbie in the marital home is flawed. While it is true that equitable division does not mean equal, the Chancellor should consider not only the economic contributions to the acquisition or maintenance of an asset but should also consider what has generally been regarded as the domestic services throughout the marriage. Flechas at ¶15

It is also worthy of note that other Ferguson factors in play in this case concern not only the direct or indirect contribution to the acquisition of the property but each spouse's contributions to the stability of the home throughout the marriage. In this case, it is clear that Robert had a drinking problem that permeated the whole relationship until their separation. (Tr. 408-410) Further, Robert was violent towards Bobbie on at least four occasions (Tr. 411) including an incident which occurred on the night of their separation. (Tr. 412) Bobbie was afraid of Robert due to his prior violent behavior and his constant drinking and intoxication led to the demise of their relationship. (Tr. 410-414)

Another Ferguson factor, a spouse's contribution to education, training or other accomplishment bearing on the earning power of the spouse accumulating the asset, when considered shows that but for the income of Bobbie, neither the renovation of the house nor the continued financial stability of the family would be secure.

Further, the goal of equitable division, according to Ferguson, is to try to eliminate alimony but yet provide for the financial needs of both parties in the future. In this case, Robert obtains ownership of all of the marital home with an equity of \$166,000.00 by the payment of \$4,400.00 to Bobbie who has no home. Subsequent to the separation, Robert provided no assistance with the living arrangements for Bobbie, Kaitlin and Drew but she

was required to live with her parents in a cramped situation. (Tr. 418) Four Thousand Four Hundred Dollars affords little money for Bobbie to obtain other housing for herself and her children and this further evidences how insufficient the Chancellor's award was.

There was no proof in the record as to the value of the marital home at the time of the marriage. Further, there was no current appraisal on the marital home to determine whether the some \$55,000.00 in renovations increased the value of the home. Whether or not the asset increased in value because of the renovations is also a factor to consider when determining what an equitable distribution should be. Here there was no such evaluation by the Chancellor and the Chancellor should have required proof from the parties relative thereto in order to be able to make said determination.

While correctly finding that the marital home was a marital asset, the Court failed to award Bobbie an equitable interest in the marital home based upon applicable law and said failure was manifestly in error and certainly evidences that an improper legal standard was applied. On remand, Bobbie submits that the Court should reconsider the value of not only the economic but also the non-economic contributions of Bobbie to the sustaining of this asset, its renovation along with consideration for the fact that she was the primary economic contributor to the overall financial stability of this family.

3. The Chancellor committed reversible error in not considering the testimony elicited before Chancellor Littlejohn before rendering his decision in this case.

As noted, Chancellor Talmadge D. Littlejohn heard testimony from several witnesses prior to recusing himself. There is mentioned throughout the transcript the Court's acknowledgment of this fact. However, the transcript of the hearing held before Chancellor Littlejohn on the merits of the case, February 22, 2008, (Tr. 136-294) were not considered by Chancellor Hatcher before rendering his decision. Three of the witnesses who testified before Judge Littlejohn did not testify again in the case, namely: Hal McPherson (Tr. 140), Bill Smith (Tr. 157) and Randy Rhudy (Tr. 187). While Robert did testify again before Judge Hatcher, there are several items of importance in his original testimony before Judge Littlejohn that are not present in his testimony before Judge Hatcher. Judge Hatcher did not have the advantage of that testimony. All issues for appeal were involved in that testimony and should have been considered.

In his later testimony, Robert acknowledges that he lied to the Internal Revenue Service and presumably the Mississippi State Tax Commission in the filing of his tax returns by under reporting his income. (Tr. 322-323) However, the extent of his willingness to lie both under oath and to the government was much more thoroughly addressed in his testimony before Judge Littlejohn. (Tr. 224-237) Robert's willingness to misrepresent the truth was

evident when discussing the selling of motorcycles for other people. He testified that the money they gave him for this was not income but a "gift". (Tr. 227)

This clearly goes to Robert's credibility. Judge Hatcher, without this in depth testimony that bears upon his credibility, found Robert to be a more credible witness than Bobbie. (R.E. 27; C.P. 231) Had Judge Hatcher had the transcript of this testimony, his finding on credibility may have been significantly different.

In addition, in the testimony of Robert before Judge Littlejohn, he acknowledges that there were substantial renovations to the marital home for which both of them made payments. (Tr. 238)

He also agreed that Bobbie was certainly entitled to her portion of the marital home. (Tr. 238-239) He also noted that in the time between the entry of the Temporary Order (August 30, 2007) and the date of the hearing (January 22, 2008) he had seen no ill effect by Kaitlin being in Bobbie's custody four times as many nights as in his custody. (Tr. 244.) Similarly, he acknowledged that there was no reason for him to believe that Kaitlin has been in harm's way since the date of separation by being with Bobbie twenty-four out of every thirty days. (Tr. 248)

On the issue of Kaitlin and her brother, Drew, he acknowledged that Drew and Kaitlin have the same brother/sister relationship as one would expect out of any two siblings. (Tr. 256) He acknowledged that Drew and Kaitlin love each other and that they miss one another. (Tr. 256) Finally, he acknowledged

that without considering what is good for him or what is good for Bobbie, if the two children are considered, it is best for the two of them to stay together. (Tr. 257, 267)

He also acknowledged that as a general rule it is important for little girls to be with their mother and admitted there were certain things a mother can talk about to her daughter that is difficult for guys to do. (Tr. 267)

These are just some of the examples of testimony elicited in front of Judge Littlejohn that Judge Hatcher did not have the benefit of. As previously noted, it was mentioned at the close of the case in discussions between the attorneys and Judge Hatcher that "Your Honor has the transcripts". (Tr. 834) Mr. Shelton repeated this statement when he states "I think Your Honor took very good notes and has the transcripts so I am not going to spend the Court's time with writing a big elaborate brief." In fact, the Chancellor did not have the transcript of the merits hearing before Judge Littlejohn and therefore could not possibly have considered all of the evidence presented in this case. For that reason, as well as the others set forth in this appeal, the case should be remanded for the Judge to reconsider his decision on all issues after reviewing the testimony of the witnesses who testified before Judge Littlejohn.

4. The Chancellor committed reversible error in failing to correctly apply the Albright factors to the evidence in this case and in awarding the primary physical custody of Kaitlin to Robert:

The Chancellor awarded the primary physical custody of Kaitlin to Robert after making a cursory review of the Albright Factors. (R.E. 27; C.P. 231) Bobbie would show that this award was contrary to the law and facts and evidences an application of an erroneous legal standard and manifest error in that he incorrectly analyzed the facts of this case with the Albright factors set forth in the case of Albright v. Albright 437 So. 2nd 1003, 1004, (Miss. 1983)

Prior to analyzing the Albright factors, the Chancellor referenced the large volume of testimony concerning Robert's alcoholism and Bobbie's marijuana use. (C.P. 227-228) The Court in essence found that both parties had rehabilitated themselves from their prior problems such that Bobbie's marijuana use and Robert's alcoholism were no longer a significant factor in the case. (R.E. 228) There was no proof in the record to contradict that Bobbie was no longer using marijuana and had not since the separation (July 13, 2007) and that Robert had quit drinking alcohol since the date of separation. (Tr. 407, 303) With these factors eliminated from consideration by the Court, the Court proceeded to make an analysis of the Albright factors.

1. Age of the child. The Chancellor found that this factor favored neither party. (R.E. 24; C.P. 228) In so holding, the

Chancellor failed to consider that at the time of the entry of the Order on Temporary Features, August 30, 2007, Kaitlin was just over four years old. Of further importance is the fact that Bobbie clearly had Kaitlin in her custody the majority of the time under said Temporary Order. (R.E. 5-7; C.P. 96-98) There was no proof whatsoever of any detriment to the child while she exercised primary custody for some twenty months before the Chancellor rendered his decision. (Tr. 367-369) While the "Tender Years" doctrine is no longer fully operational, this Court has held that the Tender Years doctrine is a factor worthy of weight in determining the best interest of the child. Passmore v. Passmore 827 So. 2nd 747, ¶9 (Miss. Ct. App. 2002) Kaitlin may be on the borderline of being a child of tender years, but even Robert himself testified to the importance of a female child being with the mother. (Tr. 267) The Chancellor is manifestly in error in not considering Kaitlin's age as being a factor favoring Bobbie.

2. Health and sex of the child. Again, the Court found that this factor favored neither party and based that determination upon the fact that the testimony was that both parties cared for and contributed to her care. (R.E. 24; C.P. 228) While this is a fair assessment of the testimony, Robert recognized the importance of a mother in a little girl's life as testified to by him before Judge Littlejohn. (Tr. 267)

3. A determination of the parent who has continuity of care prior to the separation. The Court found that both parties had

contributed to Kaitlin's care prior to the separation but slightly more of the time the personal needs of the child were handled by Robert and therefore, the Court held this factor slightly favored Robert. (R.E. 24; C.P. 228)

Again, at the time of the separation, Kaitlin was not quite four years old. The proof was uncontradicted that for the first two years of the child's life that Bobbie had more to do with her rearing than did Robert. It was Bobbie who cared for her the first six weeks of her life before returning to work to support the family and that after that she was the one who primarily transported Kaitlin to the daycare the first two years of her life. (Tr. 417, 269) Further, she picked up Kaitlin from the daycare roughly fifty percent of the time the first two years of her life. (Tr. 269) Bobbie carried her to the doctor most times as well. (Tr. 443) Robert went on frequent hunting trips during the marriage (Tr. 415) and went bowling every Tuesday night with his drinking friends. (Tr. 415) Based upon this testimony it is hard to see how Judge Hatcher found that Robert had slightly more time than did Bobbie in caring for the child prior to the separation.

As noted, since the separation, Bobbie has clearly had the child the vast majority of the time. While the Order on Temporary Features is certainly not res judicata on who should have custody, the simple fact of the matter is that the Chancellor should have considered this factor due to the large amount of time between the Temporary Order (R.E. 5-7, C.P. 96-98) and the Final Judgment

entered on May 1, 2009. (R.E. 8-36, C.P. 212-240) Also important is the fact that there was no detriment to Kaitlin whatsoever in Bobbie having custody the majority of the time between the Temporary Order and the Final Judgment, a fact admitted by Robert. (Tr. 369, 248) Such fact should not be ignored and while not specifically an Albright factor, is relevant pursuant to the rationale in the case of Jerome v. Stroud 689 So. 2nd 755, 757, (Miss. 1997)

4. Which parent has the best parenting skills. The Court again finds that this factor favored neither party. (R.E. 24-25; C.P. 228-229) In reviewing parenting skills, the Court found that both parties had rehabilitated themselves from their prior problem once the custody battle began. While this is certainly good for both parties, a review of their conduct prior to the separation sheds light on which parent exercised the best judgment when it comes to caring for their child.

While smoking marijuana is certainly not good, there is no proof whatsoever in this record that this child was ever placed at risk by such conduct of Bobbie during the marriage. She testified that there were never any problem with her carrying on her duties either at work or at home in spite of her marijuana use. (Tr. 408)

There is no proof in the record that she ever smoked marijuana in the presence of Kaitlin or that she ever drove a motor vehicle under the influence of that substance. Such is not the case with Robert, however, as the proof is clear that he not only drank to

excess at home and in the presence of the child, (Tr. 409) but he would come home intoxicated throughout the week while the child was present. (Tr. 307) Robert further admitted that on numerous occasions he drove a motor vehicle under the influence of alcohol while Kaitlin was in the car. (Tr. 307)

It also shows poor parenting skills to physically abuse a child's mother, especially in the child's presence, something that Robert did on several occasions, including the last incident on the night of the separation. (Tr. 411-412) Finally, Robert showed poor parenting skills when he told Drew, Bobbie's other child, that "Your mom has got to go." (Tr. 330)

There is no testimony anywhere in the record to indicate that Bobbie had done anything to harm this child or put the child in danger.

There can be no doubt that both of these parties have a good relationship with Kaitlin but the person who has exhibited the best decision making when it comes to the best interest of the child has always, since her birth, been Bobbie.

5. Which parent has the willingness and capacity to provide primary child care. The Chancellor found that while both parents had a willingness and capacity to provide primary care, that this factor favored Robert due in part to the efforts to rehabilitate himself, improve his lifestyle and on the contrary, Bobbie's having an adulterous relationship with other men, which she had exposed Kaitlin to. (R.E. 25; C.P. 229) As previously noted, the

Chancellor already made a determination that both parties had taken steps to rehabilitate themselves and had, in fact, done so. In spite of this initial revelation, however, he uses that in part to insinuate that Bobbie has not taken steps to rehabilitate herself.

His contention that Bobbie's relationship with another man "could be devastatingly harmful to her child" is not born out by anything in the record. Kaitlin has never been exposed to any adulterous conduct on the part of Bobbie (Tr. 499-500) and there is absolutely no proof in the record that her relationship with another man, after her separation from Robert, has had any detrimental effect on Kaitlin whatsoever.

The testimony of Harvey Russell indicated that he had had a sexual relationship with Bobbie but he denied that there were ever any children around. (Tr. 786, 789) In fact, he denied that they had even shown each other affection in the presence of the children. (Tr. 792)

Our Courts have held in modification cases that without a showing of adverse effect on a child, living with a person outside of marriage is not sufficient in and of itself to warrant a modification of visitation rights unless an adverse effect is shown. Phillips v. Phillips 557 So. 2nd 698, 701, (Miss. 1989); Harrington v. Harrington 648 So. 2nd 543, 547 (Miss. 1994) There is no such proof in this record and the Chancellor's statement that such action could be devastatingly harmful is not substantiated anywhere in the record. The Court is manifestly in error in his

findings on this Albright factor as there is no evidence, substantial or otherwise, to support his conclusions.

6. The employment of each parent and the responsibilities of the employment. The Court found that both parents were gainfully employed but Robert's self employment gave him more freedom in caring for Kaitlin. (R.E. 25; C.P. 229) The Court did acknowledge that his income was not as stable and as great as Bobbie's but still found the factor slightly favored him. (R.E. 25, C.P. 229) It has already been pointed out that Robert either regularly understates his income to the government or has little income but yet he persists in trying to remain self employed. Whether he is lying to the government or lying to the Court, he does not have income sufficient to take care of Kaitlin and but for the income of Bobbie throughout the marriage, there would have been financial difficulties. There is nothing in the record to indicate that Bobbie had ever let her employment and responsibilities of employment interfere with her caring for Kaitlin and in fact the proof showed that if she needed to be off of work to do something for her child, she was able to do so. (Tr. 417, 443)

As previously noted, Robert did not provide once cent of child support to Bobbie in the twenty months that they operated under the Temporary Order. (Tr. 390) To find that this factor favors Robert is manifest error.

7. Physical and mental health and age of the parents. Again, the Court found that this factor favored Robert for reasons

not supported in the record. (R.E. 25-26; C.P. 229-230) The Court found that the physical and mental health of Bobbie were questionable because of her continued use of "prescription drugs and narcotics" and her "engaging in dangerous extra-marital relationships in the presence and vicinity of Kaitlin." (R.E. 25, C.P. 229) There is absolutely nothing in the record to support these findings. The erroneous contention that she has engaged in dangerous extra-marital relationships in the presence and vicinity of Kaitlin has already been dispelled. As far as her use of prescription drugs and narcotics, the proof is that she was taking Lexapro and Buspar as of November 18, 2008, due in part to the stress occasioned by the divorce. (Tr. 444) The medications however, do not in any way impair her ability to work nor does it impair her ability to take care of Kaitlin. (Tr. 444-445) Therefore, the Court clearly is manifestly in error in finding that this factor favored Robert as it probably should have been a factor that favored neither in light of the Court's prior findings.

8. Emotional ties of each parent and the child. It is clear, as the Court noted, that both of these parties love Kaitlin and she loves them and the Court's finding that this factor favored neither party was correct. (R.E. 26, C.P. 230)

9. Moral fitness of the parents. The Court found that this factor favored Robert, again pointing out her relationship with another man after the parties separated. (R.E. 26; C.P. 230) Again, the Court erroneously states, however, that such conduct was

in the vicinity and whereabouts of Kaitlin. (R.E. 26; C.P. 230) There is simply nothing in the record to support this finding. The Court cites the testimony of Bobby Robbins, Bobbie's pastor, that if the child were to find out about such conduct, that "It could be devastating." Again, the Court is basing a finding on conjecture, not facts as there is simply no proof that the child has been exposed to any such conduct, much less suffered any adverse effect.

The Court refers to the adultery statute (R.E. 26; C.P. 230) but fails to cite the Mississippi statute that prohibits an individual from drinking and driving. It is clear that Robert did this as previously noted. The Chancellor further failed to mention the statute on child endangerment, conduct of which Robert is clearly guilty. Nor did the Court cite the statute on domestic violence, also conduct in which Robert clearly engaged on numerous occasions in the presence of Kaitlin. (Tr. 412-414) While having an extra-marital affair certainly should not be condoned, such conduct well after the separation of the parties pales to insignificance compared to drinking and driving with the child in the car, beating up one's wife in the presence of the child and endangering the child's health and safety by virtue by both types of conduct. The wrongful conduct of Robert is uncontradicted whereas the Chancellor's findings of if the child became aware of an extra-marital affair it would be "devastating" is both speculative and unsubstantiated in the record. The factor of moral fitness should either have been neutral in the best case

scenario for Robert or have favored Bobbie based upon the proof. The Court's finding that it favored Robert is manifest error.

10. The home, school and community record of the child. The Court found that this factor favored neither party and this is probably correct. (R.E. 26; C.P. 230) However, the Court affirmatively found that there is "no evidence in the record that she has suffered adversely in any aspect of her home, school or community record". (R.E. 26; C.P. 230) This is a correct statement of the evidence and merely supports Bobbie's contention throughout this brief that there was absolutely no adverse effect shown on this child due to any conduct of Bobbie. (Tr. 325, 340, 391, 431-433)

11. Preference of the child. The Court correctly found that this factor favored neither party. (R.E. 26; C.P. 230)

12. Stability of home environment of each parent. Again the Chancellor favored Robert for reasons that are totally unsupported by the evidence. (R.E. 26-27; C.P. 230-231) The Court stated that the "constructive desertion and habitual, cruel and inhuman treatment exhibited towards Defendant by Plaintiff for her failure to fulfill her marital duties for a protracted period of time which was a significant factor in the final separation of the parties and the instability of their home." (R.E. 27; C.P. 231) There is absolutely nothing in the record to substantiate any of that statement certainly no proof of constructive desertion nor habitual cruel and inhuman treatment. Grant v. Grant 765 So. 2nd 1263, ¶10, (Miss. 2000) The reverse in fact, is true as it was

Robert who physically abused Bobbie and who failed to support his family, relying on Bobbie to do so. The reason that this marriage became unstable was because of Robert's alcoholism, his physical abuse and violence towards Bobbie (Tr. 412) and his unwillingness to provide financial support for the family leaving that job primarily to Bobbie.

To maintain that Robert has had a stable home environment since the separation evidences a lack of acknowledgment that Bobbie has had the child primarily since the separation, has lived with her mother in a cramped situation (Tr. 418) while Robert has enjoyed the marital home and property. This factor should have favored Bobbie as it is she, in spite of the circumstances, who has maintained a stable home for her and her children with no financial help from Robert. (Tr. 390) The Chancellor was manifestly in error in his findings on this factor.

13. Stability of employment of each parent. Bobbie agrees with the Court's finding that this factor favored her as she has had the only stable employment during this marriage and since. (Tr. 391) (R.E. 27; C.P. 231)

14. Other factors relevant to the parent/child relationship. The Court failed to mention anything in this factor that was other than a reaffirmation of his prior erroneous findings. (R.E. 27; C.P. 231) The Chancellor did state that both parties had been untruthful to the Court and that both parties had attempted to conceal certain assets from the Court. Again, there is nothing in the record to show that Bobbie attempted to conceal

anything about assets as the only asset to which the Court made reference about her concealment was the value of her 401K at Mac's Tire Center. She clearly testified that the value of that retirement account was between \$8,000.00 and \$11,000.00. (Tr. 435-436)

Robert on the other hand attempted to conceal throughout the proceedings, including the testimony in front of Judge Littlejohn, his earnings. He admittedly has lied to the Federal government, State of Mississippi and to the Court what his true earnings are. (Tr. 322-323)

The most important part of this factor is what the Court did not address and that is the fact that this child, Kaitlin, has a brother, Drew, and that the ruling of the Court in awarding physical custody to Robert separates these siblings. The Court pays "lip service" to his having considered this fact on page 21 (R.E. 28; C.P. 232) of his Opinion but it is obvious that he has not applied the law to that facts on this point in making his determination of custody. (R.E. 28; C.P. 232)

The law in Mississippi is clear that the Court should, in all cases, attempt insofar as possible to keep children together in a family unit. In the case of Mixon v. Bullard 217 So. 2nd 28, 30-31, (Miss. 1968) the Court held:

The Court shall in all cases attempt insofar as possible, to keep the children together in a family unit. It is well recognized that the love and affection of a brother and sister at the ages of these children is important in the lives of

both of them and to deprive them of the association ordinarily would not be in their best interest.

In the case of Sellers v. Sellers 638 So. 2nd 481, 484, (Miss. 1994), the Court held that the ruling in the Mixon case, "Expresses a common sense recognition of the ordinary facts of life, that in the absence of some unusual and compelling circumstance dictating otherwise, it is not in the best interest of children to be separated." The Sellers case involved a custody battle between a natural parent and third party and the Court was faced with the possibility of violating the natural parent presumption or separating siblings. However, in this case, it is uncontradicted in the proof that Kaitlin has a wonderful, loving relationship with her brother Drew (Tr. 392, 310) and to separate them under the facts of this case is clearly not in the best interest of Kaitlin or Drew.

As has been shown, there is no substantial evidence to support the Chancellor's findings in his analysis of the Albright factors and his failure to adhere to this "common sense" concept that siblings should remain together is manifest error.

CONCLUSION

In conclusion, Bobbie would show that the Chancellor's decision in failing to award her any interest in the business was manifestly in error as she is entitled to some consideration for her contributions to that business throughout the marriage, both economic and non-economic.

Further, the awarding of Bobbie \$4,400.00 for her interest in the marital home that had an equity of \$166,000.00 is grossly inadequate and certainly not equitable. Her contributions to the marriage, both economic and non-economic, her involvement in the rearing of the child and providing domestic services, the fact that she was the primary financial provider throughout the marriage and the issue of whether or not the renovations of which she was a part increased the value of the asset from the date of marriage to the date of divorce evidenced that the award to her was not equitable and contrary to the Ferguson factors.

As noted, the testimony elicited before Judge Littlejohn addressed both issues of custody and division of marital property and it was manifest error for the Court not to require the transcription of that testimony for consideration prior to rendering his decision.

Finally, the Chancellor committed reversible error in awarding the primary physical custody of Kaitlin to Robert as a correct analysis of the Albright factors to the facts of this case

clearly reveals that Bobbie should have been awarded custody of the child. Of primary importance on this point is the fact that the net effect of the Chancellor's ruling was to separate Kaitlin from her brother Drew, a situation detrimental to Kaitlin.

In conclusion, Bobbie respectfully requests that the Court reverse the decision of the Chancellor for the reasons set forth herein and remand the case for further proceedings as the Court deems appropriate.

Respectfully submitted,

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SUPREME COURT OF MISSISSIPPI
Case # 2009-CA-01019

BOBBIE SUE KIMBROUGH

APPELLANT

VS.

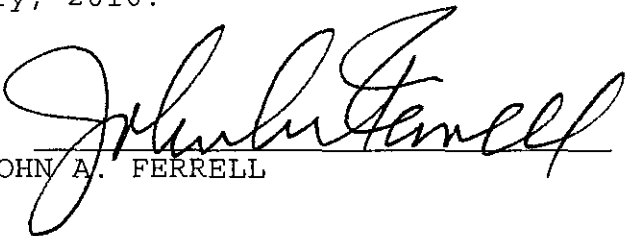
ROBERT EARL KIMBROUGH

APPELLEE

CERTIFICATE OF MAILING

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, the original and three (3) copies of the Appellant's Brief to Kathy Gillis, Clerk, Supreme Court of Mississippi at the address of said Court, P. O. Box 249, Jackson, Mississippi, 39205-0249.

This the 27th day of January, 2010.


JOHN A. FERRELL

CERTIFICATE OF SERVICE

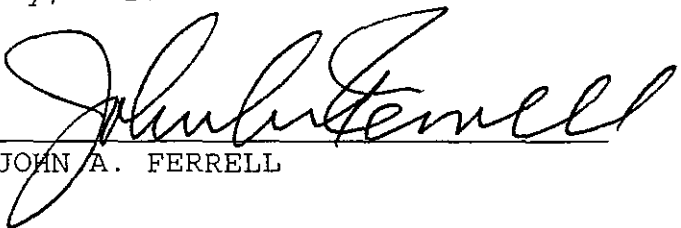
I, John A. Ferrell, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following:

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THIS the 27th January, 2010.



JOHN A. FERRELL