SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01599

MARY ELIZABETH BROWN ROBINSON — APPELLANT

VS.

PAUL ARTHUR BROWN — APPELLEE

APPEAL from THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI

Lee County Chancery Court Cause No. 02-0518-41-H

BRIEF OF APPELLEE, PAUL ARTHUR BROWN

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CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate any possible disqualification or recusal concerning same:

1. Mary Elizabeth Brown Robinson, Appellant;
2. Paul Arthur Brown, Appellee;
3. Honorable John A. Hatcher, Chancellor;
4. William R. Wright, Attorney for Appellant;
5. Stephen T. Bailey, Attorney for Appellant.

Respectfully submitted,

Paul Arthur Brown, APPELLEE

BY: _____

EDWIN H. PRIEST, MSB No. 9429

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OTHER AUTHORITIES

1. STATEMENT OF THE CASE

Mary Elizabeth Brown (hereinafter referred to as "Wife") and Paul Arthur Brown (hereinafter referred to as "Husband") were married on September 5, 1987. Of this marriage, two children were born, namely Ruth Elizabeth Brown on September 9, 1990 and Mary Rachel Brown on February 3, 1994.

On March 1, 2002, the parties separated. Wife filed a Complaint for Divorce on April 2, 2002. On July 29, 2002, the Lee County Chancery Court entered a Final Judgment of Divorce which incorporated Husband and Wife's Child Custody and Support Agreement and Property Settlement Agreement. (R. at 017; R.E. 00003). Pursuant to the Final Judgment of Divorce, Wife was awarded physical custody of the parties' two minor children with both parties having joint legal custody. (R. at 019; R.E. 00005.) The divorce decree provided that Husband would have visitation with the minor children every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday and two nights during the week. Husband was required to pay child support of $475.00 per month. (R. at 020; R.E. 00006.) The Final Judgment of Divorce also provided that Husband would secure medical and dental insurance on the children with the parties to divide equally the cost of any amounts not covered by insurance. (R. at 021; R.E. 00007.) Despite Wife being awarded physical custody, the children began to reside sixty-five percent of the time with Husband which continued unabated for approximately seven years. (R. at 124; R.E. 00039, 00082, 00083, 00210, 00211, 00226, 00227.) Wife remarried on June 5, 2009. (R.E. 00059.) After the marriage, Wife relocated to Ocean Springs, Mississippi. (R.E. 00349.) The sole reason for Wife's relocation was so she and her current husband could remain close to his son from a previous relationship. (R.E. 00348, 00349.) Neither Wife's nor her husband's employment required them to relocate to Ocean Springs. (R.E. 00349.)

On June 19, 2009, Husband file a Motion for Modification of Child Custody and for Other Relief. (R. at 080-084; R.E. 00015-00019.) Husband's motion for modification provided for, among other things, that there had been a material and substantial change in circumstances in regard to custody adverse to the best interest of the parties' minor children since the entry of the Final Judgment of Divorce. Within the motion for modification, Husband stated the following: (1) that Wife had remarried and was planning to move out of town; (2) the children desired to continue their education in the Lee County School District; (3) the minor children currently 18 years old and 15 years old respectfully preferred to live with their father; (4) that the minor children lived more of the time with the father than the mother; and (5) the minor children felt more stable living with their father. (R. at 080-084; R.E. 00015-00019.)

In response, Wife filed an Answer to Motion for Modification of Child Custody and for Other Relief wherein she denied that custody should be modified, as well as raising the affirmative defense of unclean hands. Wife also filed a Rule 12(b)(6) Motion to Dismiss. (R. at 091-092; R.E. 00020-00021.) In addition, Wife also filed a Counter-Complaint for Citation of Contempt. (R. at 093-096; R.E. 00022-00025.) In response, Husband filed his Answer to Wife's Counter-Complaint. (R. at 0109-111; R.E. 00030-00032.)

The instant matter was set for hearing on July 22, 2009. However, Wife's attorney filed a motion for continuance wherein the attorney stated that he had a scheduling conflict as well as needing additional time to conduct discovery. (R. at 100; R.E. 00027, 00050.) The parties, by agreement, reset the case for hearing on August 4, 2010. (R. at 003; R.E. 00001, 00051-00052.) On July 6, 2009, Wife propounded discovery. (R. at 105; R.E. 00029.) Husband propounded discovery on July 9, 2009. (R. at 003; R.E. 00001, 00051-00052.) Wife filed her response to Husband's

discovery on August 3, 2009. (R. at 003; R.E. 00001, 00052.) Husband provided to Wife his discovery responses on the morning of August 4, 2009. (R.E. 00052.)

At the inception of the trial, the Court first addressed Wife's Counter-Complaint for Citation for Contempt. After brief testimony and a recess, the parties were able to agree that Husband was in contempt in the amount of $22,290.30. (R. at 121; R.E. 00036, 00071-00072.) The Court gave Husband until 4:00 p.m. on August 5, 2009 in which to pay the aforementioned sum in full. (R. at 121; R.E. 00036, 00073.) The Court denied Wife's motion to dismiss based upon the doctrine of unclean hands and allowed Husband to go forward with his complaint for modification. (R.E. 00074.)

The parties' daughter, Mary Rachel Brown, who was 15 years old at the time of the August 2009 hearing, stated that her preference was to live with her father. (R.E. 00210.) Mary indicated that she had stayed primarily with her father since the time of the parties' divorce in 2002. (R. at 124; R.E. 00039, 00082, 00083, 00210, 00211, 00226, 00227.) Mary also indicated that even before the issue of her mother's move came up, that she did not have a very good relationship with her mother. In fact, Mary indicated that her mother was a source of a lot of stress. (R.E. 000211.) Also, Mary expressed her unhappiness over the fact that her mother drank every day and that she and her friends had seen her drunk. Mary also stated that during a period of time in which she was with her mother in Ocean Springs that she was very unhappy and that her heart was broken. (R.E. 00236.)

Ruth, who was almost 19 years old at the time of the August 2009 hearing, had just graduated from Saltillo High School. Ruth indicated that she would be attending the Mississippi University for Women located in Columbus, Mississippi, beginning the fall of 2009. (R.E. 00139.) Ruth indicated that since the time of the divorce that she and her sister had lived primarily at her father's house. (R.E. 00140.) Ruth testified at the hearing that she and Mary were best friends. (R.E. 00140.)

Ruth also indicated that Mary did not wish to live with either her mother or her new step-father. Ruth indicated that Mary had called her practically every night crying and admitting how much she hated it in Ocean Springs. As a result, Ruth was concerned about Mary's emotional stability as well as the fact that neither of them had ever been apart from the other. (R.E. 00141.) Ruth indicated that even though she would be attending college in Columbus, that she and Mary would still be able to see each other on the weekends at her father's house. Ruth indicated that it was her preference to reside with her father. (R.E. 00140.) Furthermore, Ruth indicated her concern that since the time of the divorce, it was a routine for her mother to come home every night and drink wine to excess. (R.E. 00142.) Ruth indicated that her mother took the stress in her life out on her. (R.E. 00144.)

After a two day trial, the Chancellor rendered his decision on August 6, 2009. (R.E. 00044, 00387-00388). Prior to its ruling, the Court found that Husband had tendered the full amount of which he was found in contempt. In rendering his decision, the Chancellor noted that while both children strongly expressed their preference to be with their father, that alone was not sufficient to justify changing custody. The Court reasoned that in order to modify an existing custody order, the moving party would have to show that there had been a material change in circumstances which adversely affects the welfare of the child and that the best interests of the child required a change in custody. Furthermore, the Chancellor noted that it was incumbent upon the court to look at the totality of the circumstances and the best interests of both of the children, which interests are the polestar consideration in reaching a determination. The Court also reasoned that a remarriage itself did not constitute a material change in circumstances that would justify changing custody nor did a simple move. (R.E. 00396.)

The Chancellor noted that the Court had reached its determination based upon all the changes since the divorce and as such, the Court found by clear and convincing evidence that a substantial

and material change in circumstances had occurred. Furthermore, the Court held that as a result of the totality of the circumstances, the actions testified to had or were likely to harm the children by "increasing anxiety and depression caused by the unnecessary uprooting from all that they know and love if they are forced to move." (R.E. 00396-00396.)

The Court having found that a substantial and material change in circumstances had occurred and that as a result the children would be adversely affected, next considered the *Albright* factors. (R.E. 00397.) In analyzing the *Albright* factors, the Court found five of the factors favored Husband with only one favoring Wife; with the balance of the factors favoring neither party. In addition, the Court noted based upon Wife's testimony, she was willing to share joint physical and legal custody of the parties' oldest child, Ruth, even though she had not applied to the Court for same. (R.E. 00356, 00379-00403.)

Consequently, the Court held that Husband had satisfied the requirements necessary to modify physical custody. The Court also required Wife to pay child support at the rate of $1,049.09 per month or $484.19 bi-weekly. (R.E. 00404.) As a result of Wife being aggrieved by the decision of the Lee County Chancery Court, she filed a Notice of Appeal on September 24, 2009.

2. SUMMARY OF THE ARGUMENT

A. Husband filed a Motion for Modification of Child Custody pursuant to Mississippi Rule of Civil Procedure 81(d)(2). Husband's Motion was set for hearing on July 22, 2009. In response, Wife filed her answer on July 3, 2009. On July 7, 2009, Wife's attorney filed a Motion for Continuance. By agreement, all pleadings were reset for hearing on August 4, 2009, and any discovery was to be expedited. Wife's attorney provided her discovery responses on August 3, 2009 and Husband's attorney provided Husband's discovery responses on August 4, 2009. Prior to exchanging discovery, the parties' counsel had spoken by telephone concerning the contents of the

other's discovery. Despite the aforementioned agreements between the parties' counsel, Wife's counsel orally requested on the date of trial an additional continuance. The Chancellor, upon due consideration, denied her motion and the trial proceeded. The Chancellor was well within his discretion in denying the motion and more importantly, Wife suffered no prejudice as a result of the denial.

B. In order to modify child custody, at trial, the parent seeking custody and modification must show: (1) a material change in circumstances occurred since the issuance of the decree sought to be modified; (2) that the material change adversely affected the minor child; and (3) it would be in he child's best interest for custody to change. *Pruett v. Prinz*, 979 So.2d 745, 750 (Miss.App.2008). Regardless, as provided in *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983) "the best interest of the child remains the Court's polestar consideration."

The Chancellor correctly found based upon the totality of the circumstances that Husband had met the first prong. In fact, the Chancellor actually held Husband to a higher standard in requiring him to meet his burden "by clear and convincing evidence" as opposed to the recognized standard "by a preponderance of the evidence". In making his determination that there had been a material change in circumstances based upon the totality of the circumstances, the Court noted that while a relocation in and of itself may not be sufficient, that such a change may be taken into account when a relocation was not necessary for economic or professional opportunity and that the parties' fifteen year old daughter, Mary, was extremely unhappy which had caused or was likely to cause increased anxiety and depression, and that children were being uprooted from all that they had ever known and loved.

The Chancellor also was correct in using his broad discretion in finding that Husband had met the second prong of a child modification test. Again, the Court looked at the totality of the

circumstances which had occurred at the time of the hearing as well as the adverse effect that would likely happen to Mary if in fact custody was not modified.

C. The Court, after having found that Husband had met the burden of proof concerning the first two prongs of a child modification trial or hearing, went into a detailed analysis of the *Albright* factors addressing each one in kind. In so addressing the *Albright* factors, the Court found that five factors favored Husband while only one favored Wife with the balance favoring neither party. Based upon the Court's analysis, the Chancellor correctly concluded that it was in the best interest of the children that physical custody be modified.

D. The Chancellor correctly addressed the issue of child support. Specifically, the Chancellor did make a written finding as to reasonableness when he noted the amount of Wife's monthly income was Five Thousand Two Hundred Forty-Five and 56/100 Dollars ($5,245.56) and set her monthly support obligation as twenty percent (20%) of said amount. The Court further provided a written finding as to reasonableness when he noted that the amount of child support of One Thousand Forty-Nine and 09/100 ($1,049.09) was being set despite the fact the Court questioned whether some of Wife's withholdings were not customarily considered as mandatory. Consequently, the Chancellor was correct in not deviating from the guidelines in establishing the amount of child support as contemplated by Miss. Code Ann. §83-19-101(4). Finally, he allowed the record to remain open for any additional proof concerning support.

3. ARGUMENT

I. The Chancellor erred in failing to grant Liz a continuance when Paul served his answer to the discovery on the morning of the trial which did not give Liz sufficient time to prepare for trial.

Wife argues that at the commencement of the trial that she should have been granted a continuance in that she did not have proper time to prepare for trial. Wife argues that the Chancellor abused his discretion in denying her motion. See *Wilson v. Wilson*, 975 So.2d 261 (Miss.App.2007) (citing *Profilet v. Profilet*, 826 So.2d 91, 93 (Miss. 2002) (trial court has broad discretion in whether to grant continuance and we will not reverse decision unless it resulted in manifest injustice).

The Chancellor correctly denied the motion for continuance. Wife's argument is misplaced. Husband filed his Motion for Modification of Child Custody pursuant to Mississippi Rules of Civil Procedure 81(d)(2) which provides in pertinent part as follows:

> The following actions and matters shall be triable seven (7) days after completion of [personal] service of process...., to-wit: modification or enforcement of custody, support....

Consequently, pursuant to Rule 81(d)(2), the matter was proper for hearing without any discovery taking place. Regardless, Husband filed the instant action on June 19, 2009, and Wife's attorney entered his appearance on July 7, 2009 pursuant to a Motion for Continuance. (R. at 100-101; R.E. 00027-0028.) By agreement, the motion for modification was continued from July 22, 2009 until August 4, 2009. (R.E. 00051.) Despite the limitations of Rule 81(d)(2), Wife did have the opportunity to propound discovery on July 6, 2009. In response, Husband propounded discovery on July 9, 2009. Wife responded to Husband's discovery on August 3, 2009. In kind, Husband responded to Wife's discovery on August 4, 2009. It was only immediately prior to the hearing that Wife's counsel made an oral request for a continuance alleging that "there are some issues that we feel like we are not prepared to respond to, if the proof goes along the lines of what is in those

discovery responses." In contesting Wife's request for a continuance, Husband's attorney noted that the attorneys had discussed the previous day in full detail what to expect from discovery and nothing unexpected was in the discovery responses. (R.E. 00052.) It is also important to note that the discovery from Husband to Wife was actually provided only 29 days after it had been propounded.

In response to Husband's attorney's statement, the Chancellor asked Wife's attorney the following: "Is there anything that was sent to you in discovery this morning that you have seen, Mr. Bailey, that really shocks you, or is so voluminous that you haven't had a chance to go through, or is incomprehensible that constitutes undue surprise?" (R.E. 00053.) Wife's attorney responded as follows: "Your Honor, Mr. Priest informed me late yesterday afternoon when I spoke that there would be some allegations in discovery that my client consumed alcoholic beverages. Perhaps I did not understand the degree that it was going to be an issue, and, apparently, her consumption of alcoholic beverages will be an important issue as far as trying to prove a substantial material change in circumstances....There are some other things in here, your Honor, that we just believe cannot be factually supported, but I'm not prepared to rebut that here today having only had a couple of hours notice." In denying the oral request, the Court noted that the matter was a Rule 81(d)(2) hearing and it had been continued once before. (R.E. 00054.) Furthermore, the Chancellor provided:

> "[I]n part because of that, I am going to overrule your motion for a continuance, but I will allow this case to be held open for rebuttal purposes if there needs to be any. Pick a date, time and place certain at the conclusion of where we are going today."

The traditional law in Mississippi regarding whether to deny or grant a continuance is left at the sound discretion of the Chancellor. *Irby v. Estate of Irby*, 7 So.3d 223, 228 (Miss. 2009). The *Irby* court citing *Rives v. Rives*, 416 So.2d 653, 656 (Miss. 1982) noted the Court affords the decision

to the sound discretion of the Chancellor. It further stated that the Chancellor's decision would not be reversed unless there is shown an abuse of discretion.

In support of Wife's proposition that she suffered prejudice as a result of the Court's denial for continuance, Wife cites the Mississippi Supreme Court case of *Schepens v. Schepens*, 592 So.2d 108 (Miss. 1991). However, the *Schepens* case is easily distinguished from the instant matter. In *Schepens*, the parties went through protracted litigation as it related to their divorce. In the particular matter, one party propounded to the other party a second request for discovery which was not answered for 106 days after same was propounded. Also, Husband listed two witnesses who were not family members and their appearance was apparently a surprise. *Schepens*, at 109. As a result, Wife's attorney stated that he was unsuccessful in obtaining any information from the two witnesses due to the witnesses refusing to speak to him. Consequently, Wife's attorney requested a continuance of two weeks in order to depose the adverse witnesses. The Supreme Court found that the Chancellor's decision should be vacated because it demanded additional testimony. The opposite is true in the instant matter.

This hearing was set as a Rule 81(d)(2) matter and Wife was granted one continuance from the previous trial date. After the parties agreed to conduct some discovery, Husband filed his responses to the written discovery propounded unto him on the 29th day. Furthermore, if Wife's attorney had reasoned that there needed to be less time in responding to the discovery, he should have filed a motion pursuant to Rule 33 requesting the Court to shorten the length of time to respond. Wife's attorney chose not to file such a motion.

Wife's attorney also acknowledged that he had spoken with Husband's attorney on the afternoon prior to trial and that within that discussion it was disclosed that Wife's consumption of alcoholic beverages as well as her relationships would be an issue. Furthermore, the Chancellor

provided that the case would be held open for rebuttal purposes if there needed to be any. In fact, he allowed the parties to pick a date, time and place certain at the conclusion of the hearing in the matter. At no point, did Wife attempt to reopen the instant matter.

With regard to the two criminal cases cited by Wife, *Stewart v. State*, 512 So.2d 889 (Miss. 1987) and *Foster v. State*, 484 So.2d 1009 (Miss. 1986), each of the cases deal with a situation in which the State either failed to disclose a material witness or did not timely respond to discovery at all. In *Stewart v. State*, 512 So.2d 889, 891 (Miss. 1987), the Court noted "this Court has stated numerous times that the prosecution's obligation to afford discovery does not hinge on the Defendant's efforts to enforce it. A request is all that is necessary." In the *Stewart* matter, the Defendant filed for discovery approximately 85 days prior to trial. The State failed to timely comply with the discovery requests unlike in the instant matter.

Wife also argues that she did not know that her drinking habits and overnight male guests were major issues at trial. In support, Wife states that "neither of the children indicated a concern with these issues when Liz's counsel interviewed them prior to trial". However, in cross-examination of the parties' daughter, Ruth, Wife's counsel asked the following question:

> Q. "Now would you agree that when you came and you talked to me in my office, I spoke to you about what your concerns were and where you desired to live. You did not tell me anything about your mother's drinking being a concern on that occasion, did you?"
>
> A. "I feel like when I met with you, you asked questions and wrote down answers. I wasn't addressed that issue."

(R.E. 00155.)

In his cross-examination of the parties' youngest daughter, Mary, he asked the question:

> Q. "Would you agree with me that when you met with me in my office, and I asked you about what some of your concerns were, you never mentioned one thing to me about your mother's drinking."

A. "If I hadn't, I guess I left it out but that is a big issue and I thought I told you. ..."

Regardless, it is disingenuous for Wife to argue that she was surprised by these "new allegations" at trial. First, Wife did not testify during the first day of trial. As such, she had time to discuss with counsel the issues of her drinking as well as her relationships. Also, it is curious to note that in her case in chief, Wife had the opportunity to recall both of her daughters which she chose not to do. Furthermore, and as discussed, the Chancellor gave Wife the option of leaving the case open to provide any rebuttal witnesses she might care to call. Again, Wife failed to do same. In the cases cited by Wife, each involves situations where discovery had not been complied with as provided under statute, unlike the instant matter wherein Husband filed his responses to the propounded discovery within the thirty (30) days allowed.

II. The Chancellor erred in finding that Paul met his burden of proving a substantial and material change in circumstance that adversely affected the best interests of the children, such that modification of custody was warranted.

As the case law clearly provides in custody cases, an Appellate Court must affirm findings of fact by Chancellors where they are supported by substantial evidence. *Holloman v. Holloman*, 691 So.2d 897, 898 (Miss. 1996). The Appellate Court may reverse the Chancellor's decision only if it is manifestly wrong or clearly erroneous, or if the Chancellor applied an erroneous legal standard. *Brocato v. Brocato*, 731 So.2d 1138, 1140 (Miss. 1999).

In order to modify child custody, at trial, the parent seeking custody and modification must show: (1) a material change in circumstances occurred since the issuance of the decree sought to be modified; (2) that the material change adversely affected the minor child; and (3) it would be in the child's best interest for custody to change. *Pruett v. Prinz*, 979 So.2d 745, 750 (Miss.App.2008).

Regardless, as provided in *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983) "the best interest of the child remains the Court's polestar consideration."

Wife argues that the Chancellor changed custody solely on the basis of Wife relocating from Saltillo, Mississippi to Ocean Springs, Mississippi. As such, Wife cites several of what she refers as "geographical relocation cases". In each of the cases cited by Wife, the Supreme Court found the move was the **sole** basis for the non-custodial parent to have filed a motion for modification for child custody. For example, *Bell v. Bell*, 572 So.2d 841, 846 (Miss. 1990) is wholly distinguishable from the matter at hand. In *Bell*, the parties were granted a "no fault divorce" where the parties agreed to be bound by a provision in their property and separation agreement which provided "[T]hat neither the husband nor the wife shall move the children from the jurisdiction without the express written consent of the other. It being the mutual intent of both parties that the children live in the Tupelo area." *Bell*, at 841. Thereafter, the wife relocated to Jackson, Mississippi to ostensibly increase her economic and employment opportunities as a harpist. As a result, the husband filed a motion to modify citing the aforementioned provision. The *Bell* court held that the provision was unenforceable since "children of divorcing parents are, in a very practical sense, wards of the court which is by law, charged to regard their best interests." *Bell* at 845. The *Bell* court reasoned that an economic, employment opportunity relocation is not per se a material change of circumstances. *See also Cheek v. Ricker*, 431 So.2d 1139, 1144 (Miss. 1983) (change in residence to obtain civil employment was not in and of itself a basis for modification of child custody); *Gray v. Gray*, 969 So.2d 906, 908 (Miss.App.2007) (relocation to a different state for increased economic opportunities is not a material change absent other circumstances); *Williamson v. Williamson*, 964 So.2d 524, 528-29 (Miss.App.2007) (custodial father's relocation to Alaska is not a material change in circumstances per se).

Wife places great significance on the case of *Staggs v. Staggs*, 919 So.2d 112, 114 (Miss.App.2005). In *Staggs*, both parties were medical doctors. During their marriage, three children were born. The parties were subsequently divorced and the wife obtained physical custody of the parties' three children. Thereafter, Wife remarried and relocated from Mississippi to Maryland as a result of her new husband's employment. As a result, the former husband filed a request for a modification of custody based upon his belief that the children were having trouble adjusting to life in Maryland. During the trial, evidence was introduced that the parties' youngest child experienced anxiety and depression as a result of the move. Additional proof arose that the mother had been arrested for prescription forgery as well as having entered rehabilitative treatment for excessive consumption of alcohol. Both the husband and wife introduced experts which refuted the other's testimony as to the cause of the child's anxiety. It was shown at the trial that the two older children had adjusted to their new home in Maryland. The Court, in rejecting the husband's motion to change custody placed great emphasis on the fact that the children should not be separated. The Court, in addressing the geographical separation and the wife's relocation, quoted from *Spain v. Holland*, 483 So.2d 318, 321 (Miss. 1986) when it simply stated "the judicial eye in such cases searches for adverse affects beyond those created (a) by the divorce, (b) by the geographical separation from one parent." The Supreme Court in upholding the Chancellor's denial of modification, noted that the Chancellor's denial was based in part because he found the best interest of all three children to be served by keeping the children together. The Court also stated that the Chancellor had cited *Nixon v. Bullard*, 217 So.2d 28, 30-31 (Miss. 1968) where the Supreme Court held that "the court shall in all cases attempt insofar as possible to keep the children together in the 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 that association would

not be in the best interests." *Staggs* at 118. Finally, the Supreme Court cited the long held law in Mississippi that "the Chancellor's finding on domestic relations will not be disturbed on appeal unless the Chancellor was manifestly wrong, clearly erroneous or applied inappropriate legal standards." *Staggs* at 122.

In the instant matter, Wife argues that the Chancellor erred and improperly applied what she refers to as "the long line of cases holding that a custodial parent's relocation is not a material change in circumstances". Wife asserts that Husband's sole basis for requesting a modification of custody was based upon Wife's relocation and the children's preference to remain with him. However, paragraph 5 of Husband's Motion for Modification of Child Custody and for Other Relief provides as follows: "That Plaintiff, Paul Arthur Brown, would show unto this Court that there has been a material and substantial change in circumstances in regard to the custody adversely affecting the parties' minor children since the entry of the Final Judgment of Divorce. Specifically, Paul Arthur Brown would show that it is in the best interest of the minor children for the Plaintiff to be awarded primary physical custody of the minor children. Specifically, the Plaintiff would show that the Defendant, Mary Elizabeth Brown, has recently remarried and plans to move out of town. That said minor children desire to continue their education in the Lee County School District. That said minor children are currently 18 years old and 15 years old, respectively, and would prefer to live with the Plaintiff. **That the minor children have lived more of the time with the Plaintiff than the Defendant and the minor children feel more stable living with the Plaintiff."** (R. at 082; R.E. 00017.) (emphasis added)

In *Ellis v. Ellis*, 952 So.2d 982, 990 (Miss. App. 2006), citing *Ash v. Ash*, 622 So.2d. 1264, 1266 (Miss. 1993) the Court held that the court must consider the totality of the circumstances. In

the instant matter, Chancellor Hatcher did consider the totality of the circumstances. (R. at 122 and 123; R.E. 00037-00038.)

At trial, the parties 18 year old daughter, Ruth, testified that since the divorce she had lived primarily with her father. Ruth also stated that it was her preference to live with her father. (R.E. 00156.) When asked why, Ruth testified that her mother would be four hours away from where she would attend college. She also stated that her friends and family were in Saltillo. Ruth further testified that she would work on weekends in Saltillo. Ruth also testified that she and her younger sister, Mary, were best friends, Mary came to her for advice and they had never been apart. (R. E. 00140-00141). Also, Ruth testified that she had specific concerns for Mary if she were required to live with her mother. Ruth noted that Mary's preference was to be with her dad because during a three week period when Mary lived with her mother in Ocean Springs, she would call Ruth every night crying about how much she disliked her mother and stepfather. Ruth also stated that if Mary was required to relocate "she's just going to lose herself." (R. E. 00141.)

Ruth testified that since the divorce she was concerned about her mother's lifestyle. Specifically, she and her sister had counted at least nine boyfriends their mother had had. In addition, Ruth and Mary were uncomfortable that she brought these men home. Also, Ruth testified that she and Mary had overheard their mother and some of these men engaging in sex. (R.E. 00142-00143.)

Finally, Ruth, in her testimony described her relationship with her mother as follows: "I mean, there's been times when, you know, I feel like I can trust her, and then, I don't know, there are just other times where its like she's just thriving off all of her stress, and she feels like she has to take it out on me, whether its financial, or with her business. Nearly everything we talk about ends up in an argument. It's like we can't communicate." (R.E. 00143-00144.)

Mary testified that she desired to live with her father because "My dad means the absolute world to me and we are so close to each other, and I can come to him for anything, and he's always there for me, and he would do anything for me and my sister, and he never puts stress on us, never tries to, like, get us involved in any kind of money situations." Mary further testified that since the divorce she lived primarily with her dad. (R. E. 00210-00211.)

Mary testified that her mother drank wine almost every day. In fact, Mary stated that she was with her mother the previous Fourth of July while her mother was intoxicated. Also, Mary testified that her mother had driven her and Ruth after she had been drinking. Mary stated that she knew her mother drove on other occasions afer consuming alcohol. (R.E. 00215, 00221. Mary also noted "Me and [her mother] do not have a good relationship. We can't communicate without fighting.... We are both angry at each other, because she wants me, but I don't want to be with her. I want to be with my dad." (R.E. 00230-00231.)

Chancellor Hatcher ruled correctly when he found that there had been a substantial change in circumstances based upon the totality of the circumstances, i.e., Wife's multiple sex partners, some of whom she engaged in sexual relations to such an extent that said relations were overheard by the daughters, her drinking to excess in front of the daughters on practically every night after she returned from work, her remarriage to a husband with whom the children could not relate to, her relocation to Ocean Springs to be near her new husband's five year old son and the increased anxiety and depression caused by Wife's unnecessary relocation to Ocean Springs. The evidence was that a substantial and material change in circumstances had occurred since the time of the divorce.

Despite the overwhelming evidence, Wife argues that even if same existed that the Chancellor was in error as to adverse affect. In support, Wife argues that "the only evidence touching on adverse affect was testimony by Paul and the children that Mary's moving to Ocean

Springs would separate her from the Saltillo community and from her older sister." Wife is wrong.

The Mississippi Supreme Court in *Jernigan v. Jernigan*, 830 So.2d 651, 653-54 (Miss.App.2002) held that a material change in circumstances may be established where a custodial parent's relocation is one of several supporting factors. In the instant matter, Wife relocated not for economic related opportunities but so her new husband could be near his five year old son. Wife admitted in her testimony that it was best for Ruth to finish her high school education at the high school in which she started. Wife testified that Ruth begged her to wait another year and let her graduate and "I agreed to do that". (R.E. 00348.) Also, Wife ignores that Mary spent three weeks in the summer with her. Mary also indicated that before her mother's move, she did not have a very good relationship with her mother. Mary noted that her mother was a source of a lot of her stress. Also, Mary expressed her unhappiness that her mother drank almost every day and that she and her friends had seen her drunk. (R.E. 00211 and 00236.) Mary acknowledged that her mother's relocation exacerbated the rift between them and that during the time she was with her mother in Ocean Springs she was very unhappy and that her heart was broken. Wife also ignores Ruth's testimony that Mary had called her practically every night crying about how much she hated Ocean Springs. Ruth expressed genuine concern about her sister's emotional stability as well as the fact that neither of them had ever been apart from the other. Wife also conveniently ignores that with Mary residing in Saltillo, she and Ruth would still be able to see each other on the weekends at her father's house since Ruth would stay with her father on the weekends.

Wife argues that "nothing in the record demonstrated that Liz's home environment was adverse to the well-being of the children as required by *Lambert* and *Pearson*." Again, Wife chooses to ignore the obvious. The Court noted that "this Court must and has looked at the totality of the circumstances in the best interest of both of the children which best interests is the polestar

consideration in reaching this determination and that remarriage itself does not constitute a material change in circumstances that would justify a change in custody nor does a simple move, which the [Wife] had every right to do." The totality of the circumstances which adversely affected the children which the court considered were Wife's excessive drinking, her relationships, Wife's relocation when it was not required by either her or her husband for economic or related opportunity, the separation of the children, the children's increased anxiety and depression as a result of the aforementioned actions which have or likely will harm the children, unnecessarily uprooting the children from all that they have every known and loved as well as the fact that they were forced to move at a time in their lives when they were 18 and 15 years of age. (R.E. 00038.)

Furthermore, the Mississippi Supreme Court in *Glissen v. Glissen*, 910 So.2d 603, 611 (Miss.App.2005) held a chancellor does not have to wait until a child is harmed before a chancellor modifies custody. The *Glissen* court citing *Riley v. Doerner*, 677 So.2d 740, 744 (Miss. 1996) stated "when an environment provided by a custodial parent is found to be adverse to the child's best interests, and that the circumstances of the non-custodial parent are changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly. This must be so, for 'in all custody cases, the polestar consideration is the best interests of the child'". The *Glissen* court interpreted *Riley* to allow a chancellor to modify child custody if the chancellor reasonably foresees that children will be harmed by a change in a custodial parent's lifestyle. The Court in *C.A.M.F. v. J.B.M.*, 972 So.2d 656, 661 (Miss.App.2007) held that a chancellor may find that "while the substantial material change in circumstances may not have at this time adversely affected the child....this court is not obligated to wait until such adverse change has occurred."

Again, Wife's argument that Husband failed to prove an adverse affect is wrong. Chancellor Hatcher found based upon the totality of the circumstances that a material change in circumstances had occurred which was adverse to the best interest of the children or was likely to harm the children. As the Court stated in *Harper v. Harper*, 926 So.2d 253, 255 (Miss. App. 2006) "in custody cases, an Appellate Court must affirm findings of fact by chancellors in domestic cases when they are supported by substantial evidence". The Mississippi Supreme Court in *Lorenz v. Strait*, 987 So.2d 427, 430 (Miss. 2008) citing *Chamvlee v. Chamvlee,* 637 So.2d 850, 860 (Miss. 1994) held as to issues of credibility and weight of the evidence are for the chancellor to conclude. Finally, Wife contends by cursory examination that the Court erred in not granting both her initial motion for directed verdict and motion to dismiss as well as her renewed motion to dismiss at the end of the cases in chief. Again, Wife is wrong. As stated by the Mississippi Supreme Court in *Sanderson v. Sanderson*, 824 So.2d 623, 625-26 (Miss. 2002) "a chancellor's findings will not be disturbed on appeal, which are supported by substantial evidence." In the instant matter, Chancellor Hatcher correctly found that based upon the totality of the circumstances there existed a substantial and material change in circumstances which was adverse to the best interests of the parties' children. Accordingly, the Chancellor's decision to deny Wife's motions for directed verdict and to dismiss was correct.

II. The Chancellor erred and/or abused his discretion in his *Albright* analysis when shifting primary physical custody of the minor children to Paul.

Chancellor Hatcher, in his final analysis, considered whether it was in the best interest of the children to modify custody based upon a detailed examination of the factors set out in *Albright v. Albright*, 137 So.2d 1003 (Miss. 1993). (R.E. 00038-00042.)

In analyzing the *Albright* factors, the Court found that five of the *Albright* factors favored Husband, one favored Wife and five favored neither party. In addition, the Court found highly in favor of Husband in that "Plaintiff's [Wife] choice to be near where her current husband lives when neither their employment requires it constitutes a telling choice....by the [Wife]....but I think it was a choice that was not necessary to be made under the circumstances. It is the desire of the children to not be separated and kept as close as possible is another factor. Further, the [Wife's] inconsistent and contradictory statements of her income and in strong contradictions to the children's testimony as to her moral activities with other men prior to her current marriage raise a question of her credibility with the court". (R.E. 00038-00040.) The Chancellor's detailed analysis of the *Albright* factors provided overwhelming proof that the Court was correct in modifying custody to Husband.

ALBRIGHT FACTORS

1. Age, Health and Sex of the Children.

First, Chancellor Hatcher determined that Ruth and Mary's age favored neither party as Ruth at the time of the hearing was 18 and Mary was 15. (R.E. 00038 and 00397.) Wife contends that the court's finding that the age, health and sex of the children favored neither parent was incorrect. In fact, Wife makes a conclusory statement that "the Chancellor wholly failed to consider the sex of the children which clearly favored the mother." In support, Wife cites *Watts v. Watts*, 854 So.2d 11, 13 (Miss. Ct. App. 2003) wherein the special judge weighed the factor in Wife's favor due to the children being female. However, the case is easily distinguishable. In *Watts,* the husband admitted that the wife was better equipped to handle certain issues as the girls matured. However, the age and sex of the children was not the determinative factor and the Supreme Court reversed the special judge in awarding custody unto Wife. The *Watts* Court noted that the special judge would cite the factors favoring the husband even though there was absolute proof to the opposite. For example,

under the continuity of care prong, the special judge found the husband to be more credible on the factor despite Wife having had physical custody of the children for over one and half years since the separation.

In the instant matter, the parties' daughters, Ruth and Mary, at the time of trial were 18 and 15. The parties had been divorced seven years. The testimony established that since the time of the divorce, Husband had the children sixty-five percent of the time. (R. at 124; R.E. 00039, 00082, 00083, 00210, 00211, 00226, 00227.) Wife implicitly admitted that by the children staying with the father for at least fifty percent of the time he was well able to care for their needs despite the fact that they were "female". Wife also argues that by Ruth having confided in her with regard to her sex life that Ruth must not feel comfortable sharing her personal information with her father. However, Wife fails to note that Ruth later stated that her relationship with her boyfriend was not something she would have been uncomfortable discussing with her father. Ruth stated she had not found the right time. (R.E. 00199.)

In *Pruett v. Prinz*, 979 So.2d 745, 751 (Miss.App.2008) the court stated it could not agree more that a parent is the most important role model in life that a child has. As such, it is necessary from a sex of child standpoint to look at what type role model Wife is to them. Ruth testified "It kind of became routine for a while where you know every night after she was done working, she would sit on the couch and drink a bunch of wine until, at some point, she wouldn't even know who we were." (R.E. 00142.) Further, Ruth testified that she and her sister, Mary, had gotten up in the middle of the night to get a glass of water during which time she could hear her mother engaging in sexual relations. (R.E. 00188.) Mary testified that while she did not see her mother drunk every day, she did see her drink wine every day. (R.E. 00215.) Mary further testified that her father meant the absolute world to her and that they were very close to each other and that she could come to him

for anything. Mary also testified that her father never put stress upon her. With regard to her mother, Mary testified that they were not very close and her mother placed a lot of stress on her and Ruth. In fact, Mary testified that every time she and her mother spoke, it always turned into a fight leaving her stressed out and unsure of her future. (R.E. 00210-00211.) Furthermore, Ruth testified as follows: "She made me feel like I could trust her. She made me feel like everything was alright, that she wouldn't ever tell anyone. That she wouldn't humiliate me publicly like this. They've [mother and step-father] both been telling me that this custody battle was going to get ugly but I never dreamed that this was what their idea of ugly was. This is ugly and I pray to God that my daughter never has to feel this way. I feel like mine and my mother's trust has been completely destroyed." (R.E. 00198-00199.) Finally, Ruth testified that Mary did not trust her step-father or her mother. (R.E. 00200.) Consequently, Judge Hatcher was correct in finding that the "age, health and sex of the children" prong favored neither party.

2. Continuity of Care.

Wife argues that the Chancellor abused his discretion in finding that continuity of care strongly favored Husband. However, the Court noted that Wife testified that the children stayed an equal amount of time with the parties, with Husband and children testifying that the children stayed approximately sixty-five percent of the time with Husband. The Chancellor concluded that as a matter of fact, based upon credibility and the weight of the evidence, that the children stayed with Husband about sixty-five percent of the time after the divorce. The Chancellor correctly concluded that the factor strongly favored Husband.

Wife cites as support for her proposition that the Chancellor abused his discretion in finding that continuity of care strongly favored Husband the case of *J.P.M. v. T.D.M.*, 932 So.2d 760, 772 (Miss. 2006). The decision in *J.P.M. v. T.D.M.* is easily distinguished. In *J.P.M.*, the mother was

the primary care giver for the parties' minor child when the child was younger. Thereafter, pursuant to court order, each rotated custody on a two week basis for a period of approximately seven months. Also, the husband was the primary care giver for fourteen months until the court rendered its decision.

In the instant matter, the Chancellor determined that the most credible evidence was that since the divorce that the children had lived primarily with the father for sixty-five percent of the time. (R.E. 00398.) Again, as this court stated in *Gable v. Gable*, 846 So.2d 296, 299 (Miss.App.2003) "because the chancellor had the opportunity to personally evaluate the witnesses' testimony and the parties' behavior, this court must be deferential to the chancellor's findings".

Finally, Wife argues that since Wife did not agree with Husband and the children as to how much time the child spent with each parent, that the Court's determination that he found to be most credible was sixty-five percent (65%) is an arbitrary number with no evidentiary support. However, as this Court noted in *Ellis v. Ellis*, 952 So.2d 982, 997 (Miss. App. 2006) citing *Lee v. Lee*, 798 So.2d 1284 (Miss. 2001) "while the *Albright* factors are extremely helpful in navigating what is usually a labyrinth of interests and emotions, they are certainly not the equivalent of a mathematical formula. Determining custody of a child is not an exact science."

3. Best Parenting Skills.

Chancellor Hatcher found as follows: "The evidence reflects both parents have adequate parenting skills, both have had moral deficiencies, both exercised poor judgment at times with alcohol and persons of the opposite sex that they are not married to or were then married to, in the presence of the children. [Husband] apparently has a better ongoing relationship with the children. This was caused in part by the [Wife's] job duties. This factor favors the Plaintiff/Counter-Defendant." (R.E. 00039.)

Wife contends that she is the parent with the best parenting skills. In support, Wife primarily "hangs her hat" on the proposition that she was the parent primarily responsible for the children's health care needs. (R.E. 00331.) Wife states that "she ultimately had to make the payments so that the children could stay on [Husband's] insurance, before she switched them over to her insurance." (R.E. 00332, page 25 of Appellant's Brief.) However, Husband testified that the sole reason he was behind on health insurance payments was due to him losing his job afer his employer fell on hard times.

In further support of her position, Wife cites the Court to *McCullough v. McCullough*, 2008-CA-00029-COA (Miss.App.2009) wherein she contends that the decision stands for the proposition that parenting skills favor the father who was "more attentive to the children's medical needs". (Page 25 of Appellant's Brief.) However, the case does not stand for the proposition as provided by Wife. In *McCullough*, the Court in determining which parent possessed the best parenting skills simply noted that in that particular situation Husband was more attentive to the children's medical needs. In the instant matter and as stated hereinbefore, Husband provided the health insurance until the time that he was terminated from his place of employment. In fact, after his termination the children continued on his medical insurance with Wife picking up the costs of the premium. Prior to that time, Wife had not reimbursed unto Husband the sums of money for the payment of the medical insurance premium even though testimony has been established that the children were spending approximately sixty-five percent (65%) of their time with Husband. In *Stark v. Anderson*, 148 So.2d 838, 843 (Miss. App.1991), the Court found as one of the factors which justified modification of custody was not that Wife had not provided medical insurance but instead that the parties' child had a cavity and personal hygiene issues which had not been addressed by Wife. In

fact, Husband's current wife who was a medical nurse, found the personal hygiene problems so severe that it bordered on neglect.

In *Hoggett v. Hoggett,* 796 So.2d 273, 274 (Miss.App.2001), custody was modified from the mother to the father and one of the factors found to be in the father's favor was that the mother disregarded the child's personal hygiene as well as showing a lack of concern for the child's severe medical problems. In the instant case, Husband provided medical insurance up until the time he was fired from his place of employment. No testimony was introduced whatsoever that the parties' children's medical or dental or personal hygiene needs were not being met. In fact, Husband has reimbursed unto Wife all outstanding insurance premiums and unpaid medical bills. (R.E. 00394-00395.)

Wife also contends that the Chancellor abused his discretion in "failing to favor Liz for her superior parenting skills in disciplining and caring for the children." Wife stated that it "is clear from the record that the parties' children, especially the younger daughter, Mary, are in need of supervision." Again, the mother's argument is misplaced. Wife implies that somehow Husband does not properly supervise Mary even though Wife allowed him to keep Mary the majority of the time. The question that begs to be asked is "if Husband's parental skills with regard to supervision were so insufficient, why did Wife allow him to have parental control over Mary the majority of the time when in fact Wife had physical custody?" The logical answer is that Wife knows Husband is a good parent and has properly supervised Mary as well as Ruth. Furthermore, Wife testified that "I think that Paul is a good dad." (R.E. 00333.) In fact, Wife acknowledged during times when Husband did not have visitation and she was out of town, she called Husband and asked him to keep the children. She acknowledged that Husband always answered in the affirmative. (R.E. 00337.)

In other words, while Wife may be saying one thing, her actions over the course of seven years belie her true belief in Husband's parental skills.

Wife also argues she has the best parenting skills because of her handling of Mary's relationship with a friend named Noel who has questionable morals. Also, she noted that Noel's older brother had been arrested for armed robbery and drug charges. Wife contends that she acted properly in responding to her daughter's need for guidance, stability and discipline. In support, Wife states that she does not allow Mary to go to her friend's Noel's house. The implication being Husband did. The parties' younger daughter, Mary, was examined by Wife's counsel wherein she was asked whether her father allowed her to go to Noel's home when she was staying at his house. In response, the daughter testified that both parents had let her go and that after the father had been informed that the mother had a problem with Mary going to Noel's home, that he no longer allowed her to go. (R.E. 00242.) The daughter did later testify that she sometimes stopped during the day by Noel's home and that she had been there at night. Mary did not testify as to whose house she was staying at the times she visited. However, Mary did testify that her father had never let her go over to Noel's home and spend the night after she had informed him of the mother's decision. (R.E. 00242.) As further support, Wife stated that she has shown superior parenting skills because she has "told" her daughter that wearing revealing clothing, heavy makeup and body piercings are not appropriate. Again, the implicit statement that Wife is trying to make is that somehow Husband would approve of revealing clothing, heavy makeup and body piercings. In fact, Mary testified when asked "did you get in trouble because you had pierced another's girl's nose" that her mother was fine with it and that her mother had even found it amusing. (R.E. 00239.) On another occasion, and again while under Wife's care, Mary testified that she did pierce her ear. (R.E. 00237.) Despite Wife's contention that she has an aversion to pierced ears, during the time in which she has had

physical custody, Mary testified that she had other ear piercings. In response, the mother simply told Mary that she would not be allowed anymore ear piercings. (R.E. 00237.) Wife also attempts to seek credit for chastising Mary for burning herself with bottle caps with her friends. However, it is important to note that Mary testified that when this incident occurred with a diet coke bottle cap that she and her friends were at Wife's house. In other words, the scar that Mary received on her arm occurred at the mother's home. On the other hand, the oldest daughter, Ruth, testified that her father informed Mary that he would not tolerate her piercing and burning her arms with bottle caps. (R.E. 00161.)

As to the heavy makeup, Wife contends that she has told her daughter, Mary, that she wears "too much makeup", but it's interesting to note that again this occurred at least in part while she was in Wife's house. Wife testified "I've actually told her she looked like other things because of her makeup because sometimes it's just way too thick and I say, you know, just calm it down a little bit. Just take a little bit of that off and you can get out of the house, but you're not leaving the house looking like that...." (R.E. 00308.)

Wife also cited the testimony of Husband's neighbor, Patricia Stogner, wherein she stated she had concerns about Husband's lack of supervision over the children. Patricia Stogner's testimony is laughable at best. Under cross-examination, Ms. Stogner admitted that during the two previous years she may have interacted with Husband on four occasions. When pressed on cross-examination, Ms. Stogner admitted that she might not know what was in the best interest of the children as it related to Husband and Wife.

Ms. Stogner also alluded to an incident from two years prior wherein the police were called to Husband's home for an alleged burglary. (R.E. 00294.) Ms. Stogner testified that the girls came over to her house in the early morning hours crying and scared and stating that they could not find

their father. However, Husband testified that on the night of the incident, that the girls and a friend had watched a scary movie and while watching the movie the girls heard a noise which scared them. Husband was in his bed asleep. Husband testified that he got out of his bed, put on his shorts and went room to room looking for the children and by the time he found them, they had gone across the street. As stated by Husband, "the whole thing was a bunch of three little girls watching a scary movie, and out of happenstance, they got scared and ran across the street." (R.E. 00118.) Wife contends that Husband interfered with her disciplining of the children. In support, Wife alluded to a situation where she went out of town and left Ruth with Husband. Prior to leaving Ruth with Husband, Wife had grounded her. While with Husband, Husband apparently made the decision to allow Ruth to spend some time with her friend. Wife returned home and she and Husband got into an argument because she contended that he had promised that he would not allow Ruth to go anywhere. (R.E. 00307.) That was the extent over the course of seven years of her contention that Husband had interfered with her discipline of the children.

The Chancellor, after having heard two days of testimony, was well within his discretion in finding that Husband had a better relationship with the children which was caused in part because of Wife's job duties. Again, it defies logic that if Wife had in fact felt that Husband possessed inadequate parenting skills, she would not have voluntarily agreed over the course of seven years to have allowed the children to have stayed with the father approximately two-thirds of the time. Wife further acknowledged Husband's appropriate parenting skills when she stated that she thought it would be in the best interest of Ruth that she and her ex-husband share joint, physical custody. (R.E. 00303.) Finally, despite the cases cited by Wife concerning discipline or lack of supervision, there is simply no proof whatsoever to support her position.

Based upon all of the evidence before the Court, Chancellor Hatcher did not err in finding that the father had the superior parenting skills.

4. Willingness and Capacity for Primary Child Care.

After consideration of all the evidence, Chancellor Hatcher found as follows: "Both parties have expressed a willingness to provide primary child care for the children. Financially, the [Wife] has proven a better capacity to provide for the children. Emotionally, the [Husband] has proven to better provide for the children. As such, this factor favors neither party." Wife contends that the Chancellor abused his discretion in failing to weigh this factor in her favor. In support, Wife cites the case of *Jordan v. Jordan*, 963 So.2d 1235, 1241 (Miss.App.2007). Wife states that *Jordan v. Jordan* stands for a proposition that "the fact that Wife had more time to spend with her children 'does not outweigh the [father's] superior capacity to support his children financially' such that the Chancellor properly favored the father in the capacity of primary child care factor." (Appellant's Brief at page 30.) Wife mis-states the reasoning in *Jordan*. In *Jordan*, the Mississippi Appellate Court affirmed the Chancellor's finding of fact regarding the willingness and capacity to provide primary child care in part on Husband's superior capacity to support his children financially. However, in affirming the Chancellor, the court noted that "the Chancellor correctly found that the [Husband's] flexible work schedule and unlimited family support favored him in this area". In addition, the Appellate Court noted that Husband had testified that he was the "one who bathed the children the majority of the time". *Jordan*, at 1241. In the instant matter, Husband stated that his job would allow him the capacity to be the primary care giver. (R.E. 00088.) Husband testified that since the time of the divorce, he had been the children's primary care giver. (R.E. 00084.) In fact, Husband testified that he had been the one to take them to the doctor, feed them, help with homework as well as tend to the children's activities, such as cheerleading. (R.E. 00084-00085.)

It is readily apparent that Husband has more than ample capacity as it relates to his home. Also, Wife admitted at trial that the children were with the father fifty percent of the time. (R.E. 00317.) Wife also testified that Husband had the willingness and capacity to provide primary child care for the oldest daughter, Ruth, when she answered in the affirmative it would be best for the parties to share joint physical custody of Ruth. (R.E. 00303.) Wife also admitted that Husband had the ability to provide for their care. (R.E. 00357.) Finally, both Husband and the children testified that the children stayed with Husband at least sixty-five percent of the time during the previous seven years. (R. at 124; R.E. 00039, 00082, 00083, 00210, 00210, 00226.) Again, Husband has shown a seven year history of being willing and able to provide primary child care for the parties' children. Finally, Wife testified that any time that something came up at the last moment, that "I would call Paul and say, you know, I do have to go out of town. Are you available? And he's like....bring them over." (R.E. 00337.)

Wife also argues that Husband's failure to pay child support shows his unwillingness or incapacity to provide primary child care. Wife goes on to argue that "Paul also had not voluntarily provided financial support for the children for years. In fact, the only child support....received for several years was $817.00 a month that DHS withheld from Paul's check." It is true that Husband was fired from his employment. (R.E. 00097.) Prior to Husband's dismissal, he had provided support. Husband also provided financial support for the children when he had Ruth and Mary the majority of the time. In fact, Wife testified that "he does watch them, clothes them and feeds them." (R.E. 00366.) Wife never provided any support unto Husband during the preceding seven years. Whether Wife calls it "voluntary" or not, Wife was receiving $817.00 of Husband's check as child support each month. Again, the fact that Wife was receiving $817.00 proves that he has capacity and the willingness to provide for the children. Husband also testified that he provided an allowance

to each of the children between $50-$75 a week. (R.E. 00099.) Furthermore, another indicia of his willingness and capacity to provide is that now that he is "back on his feet financially", he was able to pay all arrearages and related costs in the amount of $22,290.00 on August 5, 2009. (R.E. 00034-00038.)

Wife further contends that the older daughter, Ruth, can testify that her "mother gave her money for things more often than her father." However, Ruth testified that when she or her sister, Mary, asked her mother for money that her mother's usual response was "go ask your dad." (R.E. 00185.) Wife also testified that the daughters, especially Mary, had a very strong relationship with both Husband's family and her family, including Wife's mother and sister, as well as step-grandmother; all of whom are located in North Mississippi. (R.E. 00350.) Consequently, Husband would have significant support with regard to the children.

Chancellor Hatcher correctly found that the willingness and capacity to provide primary child care favored neither party. In so finding, the Chancellor relied upon approximately two days of testimony. Finally, the Mississippi Supreme Court in *Newsom v. Newsom*, 557 So.2d 511, 514 (Miss. 1990) held that it is required to respect the findings of fact made by a Chancellor which is supported by credible evidence and not manifestly wrong. In fact, the Mississippi Court of Appeals in *Jordan v. Jordan*, 963 So.2d 1235, 1239 (Miss.App.2007) citing *Mizell v. Mizell*, 708 So.2d 55, 59 (Miss. 1998) reasoned that the Court was required to respect the findings of fact made by a chancellor particularly in the areas of divorce and child support.

Finally, Wife seems to imply that she has the better financial ability and that the children have always come to her to fulfill their financial needs. However, Wife ignores the testimony of Husband wherein he stated that he gave each of the daughters between $50-$75 a week. (R.E. 00099.) That does not include the fact that the children stayed with Husband sixty-five percent of

the time at no cost to Wife. Finally, Wife indicated that her income was $60,000.00. In the past, Wife testified that she had made more than $60,000.00. However, Wife indicated that at the time of trial, her employer did not have the case load which it previously enjoyed. (R.E. 00324.) In fact, Wife stated that her business had been "very slow". (R.E. 00325.) Furthermore, Chancellor Hatcher found based upon Wife's 8.05 that her adjusted gross income was $5,245.56. Wife provided on her 8.05 Financial Statement that her total expenses was $6,341.66, which is significantly more than her income. (R.E. 00372.) When Wife was questioned about how she would be able to afford having Mary with her, she stated she hoped to get a bonus because she had been having trouble making ends meet. (R.E. 00373.) However, Wife testified earlier that there were no bonuses to be anticipated and that work was very slow. (R.E. 00325.) In contrast, Husband's prospects had improved significantly. Husband testified that he had just received a $.50 raise placing his hourly pay at $27.25. (R.E. 00098.) Husband testified that he worked normally ten hours a day, four to five days per week. Based upon his hourly wage of $27.25, Husband's gross income would average between $4,687.00 and $5,859.00 a month. (R.E. 00106.) As the math plainly shows, his financial condition at the time of trial was vastly better than Wife's.

5. Employment Responsibilities of Each Parent.

The Chancellor found as follows: "The [Wife] has had more stable employment than Husband, but both are gainfully employed. Both parent's jobs have kept them from the children at different times and in different ways, but Wife's job has done so regularly and frequently for several days at a time when Husband's job does so for several hours on a daily basis." (R.E. 00039.) This factor favors neither party. Again, Wife contends that the Chancellor abused his discretion in failing to favor her under the employment factor. Again, Wife is wrong. In support, Wife cites *Watts v. Watts*, 854 So.2d 11 (Miss.App.2003), *Marter v. Marter*, 914 So.2d 743, 750 (Miss.App.2005), *Ivy*

v. Ivy, 863 So.2d 1010, 1014 (Miss.App.2004), *Rinehart v. Barnes*, 819 So.2d 564 (Miss.App.2002) and *Massey v. Huggins*, 799 So.2d 902 (Miss.App.2001) that the employment of the parent and the responsibilities of employment favor her. As is true with all custody disputes, each case is fact specific. With regard to the instant matter, the facts established at trial with regard to employment were as follows: Husband typically works up to 50 hours a week, depending upon whether he works a four or five day work week. On one occasion, he worked six days. (R.E. 00106.) On a normal day, Husband leaves for work between 5:30 am. and 6:00 a.m. and returns between 6:15 p.m. and 6:30 p.m. At most, the parties' then fifteen year old daughter would be at home by herself not more than two hours. (R.E. 00106-00109, 00212.) Mary testified that "I've been home by myself at both houses, maybe for an hour or two, and I mean, I'm fine." (R.E. 00212.) Furthermore, Wife testified that she was not concerned that the daughter was left alone at Husband's house in the morning prior to school. (R.E. 00319.) Wife had a history whereby her employment required her to go out of town to cities such as Jackson to meet with insurance adjusters and attorneys. Also, Wife had to speak at different places as well as attend conventions. (R.E. 00317.) When she was out of town, Wife would have to be gone at times for two to three days. During the times Wife was out of town, she arranged for the children to stay with Husband. Even when the mother had been gone three days at a time according to her own testimony, she would have to demand that the girls return home because Husband's house is where they wished to stay. (R.E. 00317.) Also, regardless of either parents' hours, Mary had a job lined up at Movie Magic for September 24, 2009. (R.E. 00211-00212.) Again, based upon totality of the circumstances as it relates to employment, Chancellor Hatcher did not err in finding that the factor favored neither party. However, the Chancellor could have easily found that the employment of the parents and the responsibilities of that employment favored Husband. Despite the obvious, Wife still contends that her job circumstance is more accommodating

despite her admission that it involves some travel. Wife contends that her new husband, Lance, can stay with the children on the days she was required to be out of town. Wife's argument falls flat especially as it relates to the times she would be out of town. The children both testified that they have a very poor relationship with their step-father. Specifically, the oldest daughter, Ruth, testified that the step-father made her feel inferior and interfered with what relationship she did have with her mother. (R.E. 00144.) Also, Ruth, was upset that Lance had among other things referred to her father as an uneducated deadbeat. In fact, Ruth testified that Lance wasn't anything like a father to her because he did not understand at all what a father figure was. (R.E. 00144.) The youngest daughter, Mary, testified that she was not very close to Lance. In fact, she stated that she didn't know him well and that she felt he was trying to cause a rift between her and her sister. (R.E. 00214.)

On the other hand, Husband has a tremendous network of support in the way of family; as well as his fiancé. Wife testified that the daughter's family with whom they have a very strong relationship is located in North Mississippi. Wife stated that the youngest daughter, Mary, had a strong relationship with Wife's mother as well as her sister and that she goes to see her step-grandmother, Esther. (R.E. 00217, 00350.) Furthermore, the oldest daughter, Ruth, indicated that even though she would be attending college, it was her intent to spend the weekends with her father. Finally, Husband stated that in the event members of his family were not available, that his fiancé, Jenny Young, would be available. Husband testified that his daughters, Ruth and Mary, loved Jenny. (R.E. 00093-00094.) The parties' oldest daughter, Ruth, testified that her father didn't necessarily need Jenny with regard to providing care for Mary but regardless that Husband's fiancé would be a wonderful person in Mary's life. (R.E. 00171.) The parties' youngest daughter, Mary, testified that she found Jenny Young to be "very, very sweet". (R.E. 00217.)

6. Physical and Mental Health of Each Parent.

As noted in Wife's brief, the Chancellor did not find this factor to favor either parent. Since Wife does not challenge the Chancellor's finding with regard to the physical and mental health of the parent, Husband offers no argument on this factor.

7. Emotional Ties of Child and Parent.

The Chancellor found as follows with regard to the emotional ties of parent and children: "Clearly, the children are more emotionally tied to the [Husband] though both children expressed love for both parents, as do both of the parents for their children. The children expressed extremely close emotional ties to each other. This factor favors the [Husband], primarily because of the tie between the children as expressed for their father." (R.E. 00400.) Wife contends that the Chancellor abused his discretion in finding this factor favored Husband. However, Wife admits that "the Chancellor was correct in finding that the children are extremely close to one another." The bond between the parties' two children, Ruth and Mary, also transcended to their father. First, Ruth testified concerning her relationship with her sister, Mary. Ruth stated "we are best friends....I mean, I want the best of everything for her. I want her to feel loved and supported and I try so hard to make sure that there's not any emptiness in her life. We tell each other everything. She comes to me for advice, and I feel like she looks up to me, and we've always been there for each other...." (R.E. 00140-00141.) The younger daughter, Mary testified that "my sister is the absolute – she's everything to me, if I didn't have her....if I had to be pulled away from her and be six hours away, that would just break my heart, and if I stayed here, I would be closer to her. She will be an hour and a half away, and she'll come home on the weekends....we've always been so close, and I can rely and depend on her, and I know that she's always there for me, and I can always trust her...." (R.E. 00216.)

Ruth testified "I remember saying that my dad talks to me and makes me feel like I'm an equal....I guess in the sense he makes me feel equal is like a friend, but I also respect him. I mean, I know that he is in charge of me. I mean....he's my parent". (R.E. 00157.) Mary testified that her dad meant the absolute world to her and that they were so close to each other. Mary stated that she felt that she could come to her father for anything and that he was always there for her and that he would do anything for her and her sister. Mary testified that her father never put stress on either she or her sister about anything. In fact, Mary testified "I just know that he would do anything for me, and I just know that I want to be with him. That's really what I want". (R.E. 00210.)

Wife argued that "regardless of whether Mary lives in Saltillo with her father or Ocean Springs with her mother, Mary will necessarily be separated most of the time from her sister, Ruth, who is attending college in Columbus...." Consequently, Wife argues that with the separation of Ruth and Mary, the close emotional ties of the children favors neither party. Wife is incorrect. The Chancellor correctly noted that by having Husband gain physical custody, Ruth and Mary would be able to see each other every weekend. The Chancellor recognized that if Mary were to relocate to Ocean Springs, she would be at a minimum four to five hours away from Ruth.

Regardless, the Mississippi Supreme Court has found that the close bond between a father and a son can be a primary reason for awarding custody to the father. *Torrence v. Moore*, 455 So.2d 778, 780 (Miss. 1984). The Courts have long recognized that there is a strong preference in Mississippi law for keeping siblings together unless unusual circumstances justify their separation. See *Sellers v. Sellers*, 638 So.2d 481, 484 (Miss. 1994) (there should be no separation of siblings in absence of some unusual and compelling circumstance dictating otherwise). In *McWhirter v. McWhirter*, 811 So.2d 397, 399 (Miss.App.2001) the Court of Appeals held in a case where most of the factors between the parties were equal, that a mother should be awarded custody to allow a

male child to remain with his half brothers and sisters. In the few instances where children have been separated, such cases usually involve unusual and compelling circumstances such as a child's hostility toward a parent. See *Bowen v. Bowen*, 688 So.2d 1374, 1381-82 (Miss. 1997) (appropriate to separate siblings where oldest child is hostile to father and youngest child was disturbed by rumors of mother's apparent lesbian relationship). In the instant matter, no unusual or compelling circumstances exist.

Finally, Wife argues that the children are more distanced from their father than Chancellor Hatcher found. In support, Wife makes reference that Ruth had shared only with her mother information that she had become sexually active. (R.E. 00182-00183.) However, at trial, Ruth testified that she felt humiliated by her mother's disclosure of her relationship with her boyfriend. As a result, Ruth testified "I feel like mine and my mother's trust has been completely destroyed". (R.E. 00198-00199.) Previously, Ruth testified that "nearly everything we talk about ends up in an argument. It's like we can't communicate." (R.E. 00144.) Mary had testified that she and her mother were not very close and that her mother placed a lot of stress on her and her sister. In fact, Mary testified that even before the move that every time she and her mother talked, it always turned into a fight. (R.E. 00211.)

The Mississippi Appellate Court in *Harper v. Harper*, 926 So.2d 253, 257 (Miss.App.2006) found that Mississippi law gives a preference for keeping siblings together. If in fact, one parent relocates whereby the siblings will be separated, the Court held a chancellor is allowed to take the relocation into consideration. Based upon the overwhelming amount of evidence concerning the emotional ties of Ruth and Mary with their father, it is clear that the Chancellor was correct in finding the factor supported Husband.

8. Moral Fitness of Each Parent.

Wife concedes that the Chancellor's findings were correct and that this factor favored neither party.

9. Home, School and Community Record of Child.

The Chancellor found as follows: "The Children have been very active in the affairs of their school in Saltillo and work in Saltillo and are recognized by their peers and the parties for such. Their ties in the community of Saltillo, which the [Wife] is voluntarily leaving so that her current husband can be near his child. This factor strongly favors Husband who continues to reside in Saltillo." (R.E. 00041.) Wife contends that Chancellor Hatcher erred in finding that this factor favored Husband. In support, Wife makes a cursory argument that prior to Wife's relocation, that both parents were actively involved in the children's extracurricular activities in Saltillo. Wife goes on to state that when she decided to relocate, she encouraged Mary to become involved in activities in Ocean Springs. (R.E. 00314, 00352.) Wife argues that "the Chancellor abused his discretion in failing to consider those facts". However, Mary had previously testified that she was in the gifted art class in Saltillo and that she had part-time employment set up at Movie Magic in Saltillo come September 24, 2009. Wife also correctly notes that both of the children did well academically in Saltillo. (R.E. 00139, 00213.) Wife contends that since there is no record to indicate Mary would do poorly in Ocean Springs or that she would continue to do well in Saltillo without her mother, the Chancellor was incorrect in finding that the home, school and community record of the children factor strongly favored Husband.

In support, Ruth testified that she graduated from Saltillo High School as an "A" student with a 27 on her ACT. Ruth stated that she would be attending college to major in nursing. Ruth stated that she was partially on scholarship. (R.E. 00139.) Husband testified that Mary had primarily made "A's" and "B's" with only one "C" because she studied hard. Also, Husband stated that Ruth was

a large part of her study mechanism because anything that she needed to know, Ruth could supply. (R.E. 00095.) The parties' youngest daughter, Mary, also testified that she had been a member of the cheerleading squad, gifted art class and baseball diamond girl. Mary testified that she did stay three weeks in Ocean Springs during the 2009 summer. However, Mary indicated that she was miserable which resulted in her crying herself to sleep. Mary also testified that while in Ocean Springs, she did not have anyone to turn to because she was very close to her sister as well as her dad. (R.E. 00213.) Mary indicated that she was unable to speak with her mother because her mother stressed her out and she did not really care for her step-father, Lance. (R.E. 00213-00214.) Mary indicated that it was very important for her to remain in Saltillo because "I want to be with my father, my whole life, my family, my friends, my school. These last three years are very important to me. The people that I've grown up with, I've always known." (R.E. 00226-00227.) Wife cites *Ellis v. Ellis*, 952 So.2d 982, 996-97 (Miss.App.2006) wherein the Appellate Court found that the home, school and community record favored neither party when evidence showed the child could function equally well academically in Oklahoma or Mississippi. The case is easily distinguished. In *Ellis*, the chancellor found that the child had successfully attended school in both New Albany and Tulsa. The court noted that the child had an established social network in both Mississippi and Tulsa. The *Ellis* court in addressing the chancellor's findings noted that while the court found that the factor favored neither parent, it cannot say that this factor did not tend to favor the father. *Ellis* at 997. However, the Court reasoned that "this court is not to substitute our judgment for that of the chancellor, and, as the facts contained in this record support his conclusion, we find he did not abuse his discretion in finding this factor favored neither party." Such is the case here. Chancellor Hatcher heard two days of testimony and based upon the testimony as well as credibility he afforded each witness found that the factor strongly favored the father. The Chancellor is correct.

10. Preference of the Children at an Age Sufficient to Express a Preference by Law.

Chancellor Hatcher found that each of the children had strongly expressed a preference to live with their father and to maintain as close a relationship to each other as they possibly can and not to live with their mother. Consequently, the Chancellor found that this factor strongly favored Husband. (R.E. 00401.) Wife argues that the Chancellor abused his discretion in finding that this factor strongly favored Husband. Wife contends that because Ruth will be away at college that regardless of where Mary lives, she will no longer have day to day contact with her sister. However, Wife ignores the obvious. Ruth intends to reside each weekend in Saltillo with her father. Also, the sisters would only be one hour and fifteen minutes apart as opposed to four hours or more if Mary resided in Ocean Springs. As of September 24, 2009, Mary will have acquired her driver's license whereby she would be able to travel the short distance to see Ruth. (R.E. 00140, 00211-00212.)

Next, Wife subjectively argues that the children's preference to remain in Saltillo with their father is improperly motivated and should not be afforded such strong weight. Mississippi Code Annotated §93-11-65 reads, in its pertinent part, as follows:

> "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 and determined 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."

The Chancellor correctly concluded that this factor strongly favored Husband based upon the 18 year old and 15 year old daughters' strong preferences to live with their father and maintain as close a relationship with each other as possible. (R.E. 00402.) For example, in *Taylor v. Taylor,* 909 So.2d 1280, 1282 (Miss.App.2005), the appellate court affirmed the Rankin County Chancery Court

wherein the chancellor found that custody of a fourteen year old girl and three year old boy would be awarded to the father based upon the daughter's strong preference to live with her father. In so doing, the court noted that the chancellor had considered the strong emotional bond between the brother and sister and determined that the best interest of the children would be served by allowing them to remain together.

Wife cites *Ferguson v. Ferguson*, 639 So.2d 921, 931-32 (Miss. 1994) wherein the chancellor granted physical custody to the mother despite a fourteen year old boy's stated preference to live with his father. However, the *Ferguson* court noted that one of the prerequisites or implication of a child's preference under *Miss. Code Ann.* §93-11-65 is that both parents be fit. The court noted that the chancellor had found that the father was morally unfit to be a parent. Consequently, the chancellor was unable to grant the fourteen year old boy's preference and awarded the mother custody. In the instant matter, the overwhelming testimony is that the father is a fit person to have custody.

Regardless, Wife offers the testimony of Susan Morris and Patricia Stogner. Ms. Morris testified on direct examination that she spoke with Mary wherein Ms. Morris made the following statement: "I know how these girls are about dads, and I said, we feel like women can take care of themselves, but we don't feel like....dads can take care of themselves, so you feel like you kind of need to hang around and take care of your dad, and she said I do". (R.E. 00260.) However, on cross-examination, Ms. Morris was asked the following question:

> Q: And much ado has been made of the fact that, I think you said, Mary said that she would have to – it might be necessary for her to take care of her father. You didn't take it that literally her father needed taken care of, did you?
>
> A: No, sir.

It is apparent that Chancellor Hatcher completely discounted the witness, Patricia Stogner. Patricia Stogner admitted that at most she had been around Husband in the previous two years on two to four occasions. (R.E. 00293.)

Finally, on cross-examination, Ms. Stogner admitted that she might not know what was in the best interest of the children as it related to Wife and Husband. (R.E. 00294.)

Wife also offers conjecture that Mary's desire to remain with her father was the result of her desire to remain in Saltillo as well as her feelings of guilt over the idea of leaving her father. The argument is wholly unsupported by the record as has been discussed throughout this brief.

Wife argues that Ruth initially supported Mary moving to the coast as well as the possibility of her attending college there. Regardless, at trial Ruth testified it was her preference to live with her father on the weekends. Also, Ruth testified that she believed it was in Mary's best interest that she remain with her father so that she and Mary would be able to be together every weekend and only one hour apart during the week. Wife also speculated that "I think that if I lose custody of [Mary], it's going to take years, if ever, to repair what's going on here. If I don't get custody of her, I think it will be tough for a while but I love her and love her unconditionally." The statement is completely self-serving. Wife as stated throughout this brief has acknowledged that Husband was capable to provide for the care of Ruth and Mary. (R.E. 00357.) Wife has also acknowledged that it was in the best interest of the children to see each other as much as they can which would necessitate Mary residing in Saltillo. (R.E. 00347.). As such, if Wife was truly interested in repairing her relationship with Mary, she would support her and Ruth's preference. She has not. Regardless, the record is clear as a matter of fact as well as law that Chancellor Hatcher acted well within his discretion when he found that the preference of Ruth and Mary favored Husband.

11. Stability of Home Environment and Employment of Each Parent.

Neither party is challenging Chancellor Hatcher's findings with regard to this factor and accordingly no argument is offered.

12. Any Other Factor.

Chancellor Hatcher found as follows: The [Wife's] choice to be near where her new husband lives when neither employment requires it constitutes a telling choice....by the [Wife]....that was a choice that was not necessary to be made under the circumstances. (R.E. 00402-00403.) The Chancellor also opined as follows: The desire of the children not to be separated and to be kept as close as possible is another factor. Further, the [Wife's] inconsistent and contradictory statements of her income are strong contradictions to her children's testimony as to her moral activities, with other men prior to her current marriage, raise the issue of her credibility with the Court. Wife argues that the court should not have provided any weight to the findings he made under other factors. Wife argues that such weight by the Chancellor was an abuse of his discretion. Wife is incorrect. Wife cites the case of *Bell v. Bell*, 572 So.2d 841, 845 (Miss. 1990). Specifically, Wife cites the following language from the *Bell* decision: "We put our heads in the sand when we ignore that ours is an increasingly mobile society and that offhand that opportunities for social, economic, professional and education advancement frequently dictate to reasonable persons that they move from one community to another and often from state to another and this is so for children as for their parents. Indeed, each person enjoys an enforceable right to travel grounded in the federal constitution." *Bell* at 841, 845. Wife argues that the aforementioned language from *Bell* provides her with an unfettered right to relocate to Ocean Springs. However, as discussed previously, the *Bell* decision stands for the proposition that divorced parents cannot enter into a property settlement agreement which usurps the Chancery Court's obligation to consider what is in the "best interests of the children." *Bell* at 845.

The *Bell* decision does not, in any way, prevent the Chancellor from considering the totality of the circumstances including the effect of a relocation.

With regard to relocation, the appellate courts are primarily concerned with whether the relocation was for a legitimate professional opportunity as provided in *Spain v. Holland*, 483 So.2d 318, 321 (Miss. 1986). In the instant matter, Wife admitted that her employment as well as any economic opportunity did not require her or her husband to relocate to Ocean Springs. In fact, Wife admitted that she chose to relocate to Ocean Springs so that her husband could be close to his son. (R. E. 00348-00349.) In *Harper v. Harper*, 926 So.2d 253, 257 (Miss.App. 2006) the Court held that the relocation of one spouse could be considered in whether or not to award child custody. In *Harper*, Wife was awarded primary custody of the parties' two children during the school year with the parties' having joint physical custody for the remainder of the year. Wife relocated to Minnesota for approximately eight years. *Harper* at 255. The parties' oldest child requested to relocate to Mississippi to attend school and live with her father. The parties agreed. *Harper* at 255. The father alleged that a material change had occurred when the oldest child relocated to Mississippi. In modifying custody, the *Harper* court noted that the younger brother had depended on his sister all of his life. The *Harper* court citing *Sellers v. Sellers*, 638 So.2d 481, 485 (Miss. 1994) found that "Mississippi law gives a preference with keeping siblings together 'In the absence of some unusual and compelling circumstances dictating otherwise it is not in the best interest of the children to be separated'".

Husband acknowledges that the *Harper* case involves parties with joint physical custody. However, the logic is the same. Ruth and Mary both testified that they are extremely close with Mary being very dependent upon Ruth. While it is true that at the time of the trial that Ruth would be attending college an hour away from Saltillo, the proof was also uncontradicted that they would

be able to be together on the weekends at their father's house. On the other hand, if Mary were required to relocate to Ocean Springs, the girls would seldom see each other. Chancellor Hatcher was correct in applying some weight to the parties' physical location.

Also, Wife cites the case of *Delozier v. Delozier*, 724 So.2d 984, 986-87 (Miss.App.2007) wherein the appellate court affirmed the chancellor's holding whereby he separated a child from his half-brother. Wife cites *Mosley v. Atterberry,* 819 So.2d 1268-69 (Miss. 2002) wherein the Mississippi Supreme Court awarded custody of the parties' eighteen year old daughter to the father but affirmed the chancellor's decision to move custody of the parties' son to the mother. Again, each case is fact specific. In the instant matter, the Chancellor considered two days of testimony in finding that the best interest of the parties' children, Ruth and Mary, was to grant Husband custody.

Wife acknowledges that Chancellor Hatcher had the right to weigh the credibility of the witnesses, as well as to factor into an *Albright* analysis determining what testimony was credible. However, Wife argues that since the Chancellor did not find that Wife had committed perjury that she should not automatically lose custody. Wife argues that the Chancellor abused his discretion in weighing her credibility against her. Wife's analysis is erroneous. Specifically, Chancellor Hatcher stated that Wife's inconsistent and contradictory statements of her income and strong contradictions to her children's testimony as to her moral activities with other men prior to her current marriage raise a question of her credibility with the Court. What is implicit is that the Chancellor gave more weight to the children's testimony about Wife's sexual history in Ruth and Mary's presence as well as the Chancellor's belief that Wife was claiming deductions which were not mandatory on her provided 8.05 financial statement.

In the case of *Mosley v. Atterberry*, 819 So.2d 1268, 1273 (Miss. 2002) cited by Wife, the court concluded that "the same chancellor heard all of the testimony at all the hearings in this case.

[The chancellor] was in the best position to determine credibility and materiality of any false statements." (Emphasis added) The same is true in the instant matter.

IV. The Chancellor erred in ordering Liz to pay child support in the amount of 20% of her adjusted gross income, or $1,049.09 per month.

Wife notes in her brief that after shifting physical custody of Ruth and Mary to Husband, that Chancellor Hatcher ordered as follows:

> That child support should be and is hereinafter set to be paid by the Wife at 20% of the [Wife's] adjusted gross income as determined by this Court on a monthly basis through Exhibit 4 as $5,245.56 or child support of $1,049.09 per month or $484.19 bi-weekly commencing as of this date to be paid on the [Wife's] first pay period which according to her records is August 15, 2009. The child support compilation does not take into consideration some deductions such as STD and her 401(k) are mandatory. If it if later shown or agreed that the STD and her 401k are mandatory, child support will be readjusted. (R.E. 00042.)

Wife argues that the Chancellor erred due to her contention that he failed to make written findings as to the reasonableness of applying the statutory child support guidelines as well as "consider facts in the record which indicate the lower amount of child support was more appropriate...". Wife is incorrect as to both issues. First, the Mississippi Supreme Court in *Clausel v. Clausel*, 714 So.2d 265, 267 (Miss. 1998) held that the guidelines "do not control per se the amount of award of child support." However, child support awards are still "a matter within the discretion of the chancellor and that determination shall not be reversed unless the chancellor was manifestly wrong in his finding of fact or abused his discretion." *Clausel* at 265, 267. Second, Chancellor Hatcher set the child support to be paid at twenty percent of Wife's adjusted gross income. (R.E. 00042.) *Miss. Code Ann.* §43-19-101(1) provides that where there are two children due support, the percentage of adjusted gross income that should be awarded for support is twenty percent (20%).

Miss. Code Ann. §43-19-101(2) provides that [the Court] awarding or modifying a child support award make a specific finding that the application of the guidelines would be unjust or inappropriate in a particular case as determined by the criteria specified in §43-19-103. *Miss. Code Ann.* §43-19-103 provides in pertinent part as follows: The rebuttable presumption as to the justness or appropriateness of an award or modification of child support in this state, based upon the guidelines established §43-19-101, may be overcome [by the Court] by making a written finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case as determined by nine separate criteria.

Miss. Code Ann. §43-19-101 also provides in pertinent part under subpart (4) as follows:

> In cases in which the adjusted gross income is defined in this section is more than $50,000.00....the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable.

Wife argues that the Chancellor erred in failing to make written findings as to the reasonableness of applying the statutory child support guidelines. Wife is wrong. The Chancellor did not deviate from the twenty percent (20%) adjusted gross income awarded for the support of two children. The Chancellor implicitly determined that twenty percent (20%) of Wife's adjusted gross income was reasonable wherein he stated "child support should be and is hereinafter set to be paid by the [Wife] at twenty percent (20%) of Wife's adjusted gross income as determined by this Court on a monthly basis through Exhibit 4 as $5,245.56." The Chancellor's determination that child support should be twenty percent (20%) of Wife's adjusted gross income is in and of itself a written finding that the application of the guidelines as set in *Miss. Code Ann.* §43-19-101(1)(1) is reasonable. Regardless, even in the absence of a written finding, a decision may be affirmed if the record supports the award. See *Clark v. Clark*, 754 So.2d 450, 459 (Miss. 1999) (record supported chancellor's award as well as chancellor's offer to reevaluate figures if payor would submit more

complete financial data). Chancellor Hatcher did not deviate from the twenty percent (20%) statutory guideline. A review of the record, in light of *Miss. Code Ann.* §43-19-103 criteria as to whether the application of guidelines would be unjust or inappropriate, clearly supports the Chancellor's finding. In fact, only two of the criteria, (b) and (e), could possibly have any application. Section (b) provides that the independent income of the child may be taken into account. However, the oldest daughter, Ruth's testimony was that she would be working on the weekend. It's hard to reason that her working on the weekend at a pharmacy would have much impact on meeting the needs of Ruth. Furthermore, Wife did not offer any proof as to what Ruth's income would be at the pharmacy. Also, any income that Ruth may earn at the pharmacy would be offset under section (e) which acknowledges that an older child has greater needs. Furthermore, no proof has been introduced that Wife would have any increased costs with regard to Ruth's college as Ruth testified that she would be on scholarship(s) with the balance to be paid from her work and student loans.

As in *Clark*, Chancellor Hatcher agreed to allow the record to remain open to allow additional proof. The Wife never provided any such information. Wife cites cases wherein there was a deviation by the Court from the statutory guidelines. In each of the cases cited by Wife, the payor either had income that was substantially more than the statutory guideline, had increased college expenses, had agreed to pay college expenses in lieu of child support or reduced child support. Consequently, none of the cases cited by Wife have any application in the matter at hand.

Wife's argument that the application of child support guidelines was not reasonable in this case due to her being responsible for one-half of uncovered medical expenses rings hollow. Specifically, the criteria for receiving credit for the payment of medical expenses only takes into account under *Miss. Code Ann.* §43-19-103(a) extraordinary medical, psychological, educational or

dental expenses. No proof was offered at trial that either daughter incurred extraordinary expenses. In total, Chancellor Hatcher made a written finding as to reasonableness as to the amount of child support which was supported by the record.

4. CONCLUSION

The Court correctly found based upon the totality of the circumstances that Husband proved that a substantial and material change in circumstances occurred since the divorce which was adverse to Ruth and Mary. The Chancellor was correct in finding that it was in the best interest of Ruth and Mary to modify custody after a thorough analysis of the *Albright* factors.

The Chancellor was well within his discretion in denying Wife's second motion for continuance in light of Mississippi Rule of Civil Procedure 81(d)(2), as well as the parties' previous agreement to the trial date. Finally, the Chancellor correctly followed the recognized criteria in establishing child support.

The Judgment of the Lee County Chancery Court was correct and should be affirmed.

RESPECTFULLY SUBMITTED this, the 4th day of June, 2010.

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CERTIFICATE OF SERVICE

I, Edwin H. Priest, attorney for Appellee, Paul Arthur Brown, do hereby certify that I have this day filed this Reply Brief of Appellee, Paul Arthur Brown, with the Clerk of this Court, and have served a copy of this Reply Brief by United States mail with postage prepaid on the following persons:

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