IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARY ELIZABETH BROWN ROBINSON — APPELLANT

VS. — NO. 2009-CA-01599-COA

PAUL ARTHUR BROWN — APPELLEE

APPEAL FROM THE CHANCERY COURT
OF LEE COUNTY

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT NOT REQUESTED

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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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mary Elizabeth Brown Robinson, Appellant, and Lance Robinson, Spouse;
2. Paul Arthur Brown, Appellee, and Jenny Young, Spouse;
3. Wright Law Firm, P.A., whose attorneys are William R. Wright, Willard Benton Gregg, Trhesa B. Patterson, and Amanda Jane Proctor, Attorneys of record for Appellant;
4. Stephen T. Bailey, Trial Counsel for Appellant;
5. George E. Dent, Former Counsel for Appellant;
6. Edwin H. Priest, Attorney of record for Appellee;.
7. Gary Carnathan, Former Counsel for Appellee;
8. Michael B. Gratz, Sr., Former Counsel for Appellee;
9. Honorable John A. Hatcher, Chancellor; and
10. Pam Dallas, Court Reporter.

SO CERTIFIED this the 26 day of July, 2010.

Amanda Jane Proctor

Attorneys of Record for Appellant

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

It is undisputed that the day before trial opposing counsel discussed Paul's discovery responses. (Tr. 5; R.E. 00052.) However, Paul did not serve his written responses until 10:52 a.m. on the first day of trial. (Tr. 3-4; R.E. 00050-51.) That was when Liz first realized her drinking habits and other matters would be major issues at trial. (T. 4, 6; R.E. 00051, 00053.) Liz was unprepared to defend against these new issues raised in Paul's discovery responses with only a few hours notice.

The Appellant's Brief at pages 11-12 cites to various cases in support of Liz's argument that the chancellor erred in denying her a continuance.[1] Paul argues those cases are distinguishable because the opposing parties therein either failed to disclose a material witness or did not timely respond to discovery. Paul seemly argues that because Liz had an opportunity to interview the key witnesses–the two children–before trial, it was her own fault for not knowing the right questions to ask. However, Paul cites to several excerpts from trial[2] wherein it is obvious the children did not disclose during pre-trial interviews by Liz's counsel that her drinking and overnight male guests would be major issues at trial. (Appellee Br. 11-12.) Paul completely ignores the fact that a witness's

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[1]*See Schepens v. Schepens*, 592 So. 2d 108 (Miss. 1991) (vacating custody award when wife was denied a continuance; husband filed answers to her second set of interrogatories only four days prior to trial and listed new witnesses whom wife was unable to interview prior to trial); *Stewart v. State*, 512 So. 2d 889 (Miss. 1987) (trial court's denial of defendant's request for a continuance was not harmless error; State provided discovery one day before trial); *Foster v. State*, 484 So. 2d 1009 (Miss. 1986) (reversing defendant's conviction when he was denied a continuance because the prosecution revealed the name of a confidential informant ten minutes before trial despite a discovery request); *McKinney v. State*, 482 So. 2d 1129 (Miss. 1986) (trial court erred in denying a continuance when the State furnished a copy of a witness's statement to authorities on the day before trial despite a discovery request).

[2]At trial, Ruth told Liz's counsel: "I feel like when I met with you, you asked questions and wrote down answers. I wasn't addressed that issue." (Tr. 108; R.E. 00155.) Mary similarly testified, "I guess I left it out but that is a big issue and I thought I told you. Maybe, I hadn't." (Tr. 199; R.E. 00246.)

stonewalling and failing to disclose what their anticipated testimony would be is just as prejudicial as not knowing the identity of the witness at all. Paul also states that opposing counsel discussed his discovery responses the day before trial. However, Paul wholly fails to address that in *Stewart v. State*, the Supreme Court found a trial court's refusal to grant the defendant a continuance was not harmless error even though discovery responses were served on the defendant one day before trial and the State averred "we went over every witness for the State and told him yesterday what they would testify to, which obviously we do not have to do." *Stewart v. State*, 512 So.2d 889, 891 (Miss. 1987). Here, as in *Stewart*, serving written responses hours before trial is not sufficient, even if counsel discussed the responses the day before. Liz was still deprived of her right to a fair trial.

Paul also claims he responded to discovery within 29 days, and therefore the cases cited by Liz are inapplicable because they dealt with untimely discovery responses. Paul fails to understand that the issue in this case was not whether discovery was responded to within 30 days. Rather, the issue is whether discovery responses were "*made at a time far enough in advance of trial to give the defense a 'meaningful opportunity' to make use of it.*" *Stewart*, 512 So. 2d at 892 (emphasis added). That did not happen here. Therefore, the chancellor erred in denying Liz's motion for a continuance.

Paul further attempts to argue "the matter was proper for hearing without any discovery taking place" because his *Motion for Modification* was filed pursuant to MISS. R. CIV. PRO. 81(d)(2), under which custody modifications are triable seven days after the completion of service of process. (Appellee Br. 8.) Paul conveniently ignores the fact that the parties agreed to continue the matter in order to conduct discovery, and both parties did in fact propound discovery. (R. at 100; Tr. 3; R.E. 00027, 00050.) However, Paul did not respond to Liz's discovery until the morning of the first day of trial. (Tr. 5: R.E. 00052.) Therefore, Paul's argument is misplaced.

Paul also argues that Liz could have filed a motion pursuant to MISS. R. CIV. PRO. 33 asking

the Court to shorten the time for responding to discovery. Paul's argument is eviscerated by his own reliance on *Stewart v. State*, 512 So. 2d 89, 891 (Miss. 1987) for the proposition 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." (Appellee Br. 11.) Paul's argument also ignores the fact Liz had no reason to file a RULE 33 motion prior to trial because her counsel thought he understood what Paul's discovery responses would be based on his discussions with opposing counsel. It was not until Paul served his written responses on the morning of trial that Liz and her counsel first realized Liz's drinking habits and overnight male guests would be major issues at trial. (T. 6; R.E. 00053.) Upon learning this, Liz's counsel promptly moved for a continuance which should have been granted.

Paul also states Liz did not testify during the first day of trial and, therefore, she had time to discuss these new issues with her counsel. Paul is flat out wrong. First, Liz did in fact testify on the first day of trial. (Tr. 11; R.E. 00058.) Second, when Liz was not testifying during that first day, Liz and her counsel were obviously both present and otherwise engaged. Two key witnesses–Paul and the older daughter Ruth–testified during that first day and were cross-examined by Liz's counsel. It is ludicrous for Paul to argue Liz and her counsel could have taken time out to prepare Liz and other witnesses regarding new issues while trial was proceeding without them. That was exactly why Liz asked for a continuance – for time to adequately prepare prior to trial. Finally, Paul argues Liz had the opportunity to recall the children or to reopen the case for rebuttal witnesses but chose not to. Paul's argument is akin saying Liz could have stuck a band aid on a gapping wound. Paul ignores the fact that by allowing trial to proceed without time to prepare, the damage to Liz had already been done. Liz should have been given a continuance so that the injury never occurred.

Liz should have been granted a continuance in order to prepare for new and extensive issues raised in Paul's discovery responses served on the morning of trial. The chancellor abused his

discretion in denying Liz's motion for a continuance, and Liz suffered prejudice as a result.

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

1. *No Material Change in Circumstances*

It is undisputed that Paul, as the moving party, had the burden of proving by a preponderance of the evidence, a material change in circumstances since the last custody decree, that adversely affects the welfare of the children, and that modification of custody is in the children's best interest. *Staggs v. Staggs*, 919 So. 2d 112, 115 (Miss. Ct. App. 2005). Paul failed to meet his burden of proof.

According to Mississippi case law, the relocation of a parent with primary physical custody does not constitute a material change in circumstances.[3] Paul attempts to distinguish such case law by claiming therein "the move was the sole basis for the non-custodial parent to have filed a motion for modification for child custody." (Appellee Br. 13). Paul presumably concedes a custodial parent's relocation alone will not constitute a material change. However, Paul argues he cited other reasons in his *Motion for Modification*, and, therefore, the chancellor must have relied upon those reasons as well. To the contrary, the chancellor's *Order* states: "...the Court finds by clear and convincing evidence that a substantial and material change in circumstances has occurred, to-wit, that [Liz] moving to Ocean Springs seeking to take the children with her..." (R. at 123; R.E. 00038.) In any

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[3] *See Bell v. Bell*, 572 So. 2d 841, 846 (Miss. 1990) (affirming decision allowing mother to relocate with child; "[t]hat a parent moves is certainly not per se a material change in circumstances"); *Cheek v. Ricker*, 431 So. 2d 1139, 1144 (Miss. 1983) (custodial mother's relocation from Starkville, Mississippi to Houston, Texas was not a material change); *Gray v. Gray*, 969 So. 2d 906, 908 (Miss. Ct. App. 2007) (custodial father's relocation to Arkansas for better opportunities was not a material change when the children were well cared for and were doing well socially and in school); *Williamson v. Williamson*, 964 So. 2d 524, 528-29 (Miss. Ct. App. 2007) (affirming denial of modification when custodial father's relocation to Alaska had not adversely affected the child when her special educational and health needs were being provided for); *Balius v. Gaines*, 908 So. 2d 791, 802 (Miss. Ct. App. 2005) (custodial mother's move to California, absent any showing of adverse effect, was not a material change).

event, Paul's other allegations cannot suffice to meet his burden of proving a material change.

For example, Paul claims a custody modification was warranted because the children wanted to continue their education in the Lee County School District and preferred to live with him. However, the trial transcript clearly reveals that Mary's preference is rooted in her desire to remain in Saltillo and her reluctance to relocate. (Tr. 182-83, 287-88, 303; R.E. 00229-230, 00334-335, 00350.) Therefore, Paul's argument in this regard is a thinly veined relocation argument. As stated above, case law holds a custodial parent's relocation is not a material change in circumstances.

In *Staggs v. Staggs*, 919 So. 2d 112 (Miss. Ct. App. 2005), the Court of Appeals affirmed a chancellor's determination that a mother's relocation to Maryland to be with her new husband was not a material change even though the son preferred to live with his father. Paul attempts to distinguish *Staggs* by saying the Court's decision not to modify custody "placed great emphasis on the fact that the children should not be separated." Paul quoted from *Mixon v. Bullard*, 217 So.2d 28, 30-31 (Miss. 1968): "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 their best interests." (emphasis added). Paul ignores the fact that the *Mixon* Court affirmed the trial court's determination that the father had failed to prove a material change when the only change since the last custody decree was the mother's relocation from Florida to New York. *Id.* at 29-30. Paul also ignores the fact that the *Mixon* Court affirmed the trial court's refusal to grant the request of the son, age 13, to remain in Mississippi with his father. *Id.* at 30-31.

Paul makes much ado about the separation of the siblings and claims a custody modification is necessary to avoid separating Mary from her sister Ruth. However, *Mixon v. Bullard* is easily distinguished as those two children were ages 9 and 13. *Id.* at 29. In this case, the children were ages 15 and 18 at the time of trial. (R. at 123; R.E. 00038.) At these advanced ages, the children were

inescapably reaching adulthood and would naturally grow apart. In fact, Paul testified that the elder daughter Ruth would be attending college at the University for Women but would be returning to his home in Saltillo every weekend. (Tr. 32; R.E. 00079.) Paul further testified that if Mary lived in Ocean Springs with Liz, then Ruth would not be able to drive down to Ocean Springs every weekend to see her sister. (Tr. 33; R.E. 00080). Therefore, Paul concludes that he should be awarded custody so that Mary would remain in Saltillo and "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." (Appellee Br. 18.) Paul's argument that custody should be modified to avoid separating the children is illogical.

The fact is that Ruth and Mary will not see each other during the week when Ruth is at college. As for the weekends, the chancellor stated the following after awarding custody to Paul: "...this Court...directs the parties to submit a plan for visitation if they can come up with one. Otherwise, it will be the same visitation for [Liz] as [Paul] had in the original order." (R. at 127; R.E. 00042). Under the original order, Paul had regular visitation with the children every other weekend from Friday to Sunday. (R. at 19; R.E. 00005.) Without any other visitation schedule in the record, we are left with following conclusion: if Mary resides with Liz in Ocean Springs, then she will visit Paul in Saltillo every other weekend. Conversely, if Mary resides with Paul in Saltillo, then she will visit Liz in Ocean Springs every other weekend. So regardless of who has primary physical custody, Mary will only see her sister in Saltillo every other weekend! It makes no sense for Paul to be awarded custody so the children will not be separated when the children will see each other exactly the same amount of time regardless of who has custody! The separation of siblings doctrine is inapplicable in this case and cannot be used as a justification for modifying custody.

Paul next claims a custody modification was warranted because the children have lived more of the time with him since the divorce and feel more stable living with him. At trial, Liz hotly

disputed Paul's assertion that the children spent more time with him. (Tr. 269-70; R.E. 00316-317.) Liz conceded the parties deviated from the original custody schedule and that she allowed Paul extra time with the children. (Tr. 269; R.E. 00316.) However, Liz should not be punished for this good deed by losing custody. It would be bad precedent for this Court to hold a custodial parent's allowing the other party to have liberal access to their children is a reason to take her children away. Allowing the non-custodial parent additional time with the children can only be to the children's benefit. Without any adverse affect from the non-custodial parent having more time with the children, there can be no material change. On the other hand, if Paul is somehow arguing the children have been harmed by spending more time in his care, then obviously he should not be awarded custody. Therefore, Paul's assertion that the children have spent more time with him since the divorce and have more stability with him cannot constitute a material change in circumstances adverse to the best interests of the children. Such allegations, if true, are more properly considered under the *Albright* analysis, if the moving party can first prove the required material change, which Paul cannot.

Next, Paul claims a custody modification was warranted because of Liz's drinking habits and because at some point since the divorce, Liz had overnight male guests to whom she was not married, and the children allegedly heard Liz engaging in sexual relations with these men. However, Paul's failure to seek a modification until Liz was on the verge of relocating with the children belies his contention that these circumstances constitute a material change. Moreover, at the time Paul filed for modification, Liz had remarried. In fact, it was Paul who continued to have overnight guests of the opposite sex to whom he was not married in the children's presence. (Tr. 62-63, 124, 187; R.E. 00109-110, 00171, 00234.) It was also Paul who had ongoing drinking problems at the time of trial.[4]

[4]Paul testified he had "cut" back his alcohol consumption, so that he has "maybe two, maybe three drinks on the weekends a day." (Tr. 47; R.E. 00094.) Paul admitted he told Liz he didn't know if he

In *Ruth v. Burchfield* 23 So.3d 600, 602-05 (Miss. Ct. App. 2009), the Court of Appeals affirmed a chancellor's refusal to modify custody even though the mother's twenty-year-old son had used drugs and had an inappropriate relationship with the underaged babysitter in child's presence. The chancellor found: "both the teenaged son and the girlfriend/babysitter no longer are present and the potential for adverse effect has been removed." *Id.* at 605. The Court of Appeals affirmed: "the issues raised by Ruth regarding conduct that Mara has been exposed to while in Burchfield's primary care are moot." *Id.* at 606. Like in *Ruth*, Liz's previous conduct in having overnight male guests was a moot issue by the time of trial and was not a reason to modify custody. When that argument fails, Paul argues the opposite–that Liz's remarriage constituted a material change. However, the chancellor clearly and correctly rejected this argument stating: "remarriage itself does not constitute a material change in circumstances that would justify a change of custody." (R. at 122; R.E. 00037.)

When all of Paul's arguments fail, we return to the one and only true issue in this case–Liz's relocation. Paul argues Liz's relocation was unnecessary and motivated by her desire to be near her new husband's young son. Paul attempts to distinguish case law holding a custodial parent's relocation is not a material change by making a feeble argument that "the *Bell* court reasoned that an economic, employment opportunity relocation is not per se a material change of circumstances," and by claiming *Gray v. Gray* and other like cases involved relocations for employment or economic opportunities. However, the *Bell* court found the mother's reasons for relocating were as follows:

> The details aside, Carolyn's course was impelled by not irrational considerations, one economic - employment opportunities for a musician and harpist were reasonably likely to be far greater in Jackson than in Tupelo, and the other social (if not psychological) - Joe was a native of Tupelo and Carolyn was not. Carolyn found

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was an alcoholic and "that alcoholism could be something." (Tr. 76; R.E. 00123.) Both children had seen Paul drinking alcohol. (Tr. 75, 185, 120-121; R.E. 00122, 00232, 00167-168.) According to Mary and Paul's neighbor, Paul likes to mix whiskey and coke. (Tr. 185, 228-29; R.E. 00232, 00275-276.)

> particular difficulty in accepting Joe's less than platonic relationship with another woman who was separated from her husband but not yet divorced, none of which did the children much good either.

Bell v. Bell, 572 So.2d 841, 844 (Miss. 1990). Similarly, in *Gray v. Gray*, 969 So.2d 906, 907 (Miss. Ct. App. 2007), the custodial father testified he relocated from Mississippi to Arkansas, "to escape harassment from his ex wife and her father." Clearly, case law does not support Paul's contention that a custodial parent can only relocate with her children if she has sufficient economic or employment reasons to relocate. Even if case law did so hold, Liz was motivated by both economic and social reasons to relocate to Ocean Springs: she and her new husband's mutual employer had an office nearby, and her husband was from the area and had a young son living there. (Tr. 301, R.E. 00348.) So long as custodial parent relocates in good faith, it should not be in the chancellor's purview to question the relocation and ask, how mandatory was it? In fact, *Bell* and *Gray* suggest it is permissible for a custodial parent to relocate with the children in order to escape the other parent.

What this case truly boils down to is a generic relocation case plus a separation of the siblings argument. Unfortunately for Paul, the separation of siblings doctrine is inapplicable to this case as the children will see each other exactly the same amount of time regardless of who has custody. Liz's relocation, as explained at length above, cannot constitute a material change in circumstances. Therefore, the chancellor erred in finding that Paul had met his burden of proving a material change.

2. *No Adverse Affect on the Best Interests of the Children*

Paul had the burden of proving a material change in circumstances which adversely affected the best interests of the children. In *Lambert v. Lambert*, 872 So. 2d 679, 684 (Miss. Ct. App. 2003), the Court of Appeals described this burden of proof by stating: "It is only that behavior of a parent which clearly posits or causes danger to the mental and emotional well-being of a child (whether such behavior is immoral or not), which is sufficient basis to seriously consider the drastic legal

action of changing custody." The chancellor erred in finding Paul had met his burden of proving a sufficient adverse affect upon the children and thereafter modifying custody.

Paul claimed he had met his burden of proving an adverse affect on the best interest of the children, but he could point to no specific harm that came to the children other than vague allegations of "stress" and "unhappiness" which were largely rooted in Liz's relocation to Ocean Springs and Mary's separation from her older sister Ruth who was going away to college. (Appellee Br. 18-19.) However, any alleged adverse affect experienced by Mary as a result of being separated from Ruth cannot be a reason for modifying custody as the children will see each other exactly the same amount regardless of who has custody. *See* discussion *supra* Part II.1. Hence, Mary will suffer the exact same "adverse effect" from being separated from Ruth regardless of who has custody. Moreover, Mary's "unhappiness" over being asked to relocate is nothing more than "typical adjustment reactions to a move" and is not a reason to modify custody. For example, in *Staggs v. Staggs*, even though the son was resentful about his mother's relocation and did not want to make new friends, this was described as "typical adjustment reactions to a move," and the Court of Appeals held that the father had failed to show an adverse affect. *Staggs v. Staggs*, 919 So. 2d 112, 117-122 (Miss. Ct. App. 2005). Similarly, in *Lambert v. Lambert*, the Court of Appeals found the father had failed to prove a sufficient adverse affect when the mother's expert testified that the child's anxiety was from the litigation over the mother's relocation and nothing in the mother's home environment was adverse to the child. *Lambert*, 872 So. 2d at 685-86. Like in *Staggs* and *Lambert*, Paul has wholly failed to meet his burden of proving an adverse affect sufficient to modify custody.

After having failed to demonstrate any adverse affect, Paul attempts to argue that *Glissen v. Glissen*, 910 So. 2d 603 (Miss. Ct. App. 2005), *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996), and *C.A.M.F. v. J.B.M.*, 972 So. 2d 656 (Miss. 2007) stand for the proposition that a chancellor does not

have to wait until a child is harmed to modify custody. (Appellee Br.19.) However, *Riley v. Doerner* is distinguishable and actually set forth a the following modification standard:

> ...when the environment provided by the custodial parent is found to be adverse to the child's best interest, *and* that the circumstances of the non-custodial parent have 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....Evidence that the home of the custodial parent is the site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that such environment has adversely affected the child's welfare.

Riley, 677 So. 2d at 744. First, our facts are vastly different from *Riley* as there is no allegation that Liz's home is the site of illegal drug use. Moreover, *Riley* set forth a new modification standard which is separate and distinct from the traditional material change in circumstances standard pled by Paul and relied upon by the chancellor in modifying custody. In fact, Paul never alleged or demonstrated that his circumstances had changed such that he was able to provide a more suitable environment than Liz. Therefore, *Riley v. Doerner* is wholly inapplicable.

Glissen and *C.A.M.F.* are also distinguishable. In *Glissen*, the Court of Appeals interpreted *Riley* to allow a chancellor to modify custody when he "reasonably foresees" that the children will be harmed by a change in the custodial parent's lifestyle, which in that case included the mother's cohabitation with a married man who was a convicted felon, had declared bankruptcy, and had a history of drug use, drinking problems, and violence. *Glissen*, 910 So. 2d at 606-07, 611. Similarly, in *C.A.M.F.*, the Court of Appeals affirmed a chancellor's finding that it was not obligated to wait until an adverse affect had occurred when the evidence showed that the mother's new husband upset the parties' son by taking nude photographs of him, the new husband had repeatedly exposed himself to others, and the new husband had also upset the son by choking the mother. *C.A.M.F.*, 972 So. 2d at 659-61. In the present case, there are no drastic circumstances akin to those presented in *Glissen* or *C.A.M.F.* which clearly posited foreseeable harm to the children. *See Ruth v. Burchfield*, 23 So.3d

600, 605-06 (Miss. Ct. App. 2009) (affirming chancellor's refusal to modify custody and rejecting father's argument that under *C.A.M.F. v. J.B.M.* and *Riley v. Doerner*, the chancellor is not obligated to wait until the child is adversely affected before modifying custody, stating: "...we note that our facts do not compare to what transpired in either *C.A.M.F.* or *Riley*; thus, we find both cases distinguishable from our case.") Thus, Paul's reliance on *Riley*, *Glissen* and *C.A.M.F.* is misplaced.

Paul failed to show an adverse affect on the best interest of the children. Thus, the chancellor erred in finding Paul had met his burden of proof and further erred in thereafter modifying custody.

3. *Directed Verdict and Motion to Dismiss*

The chancellor erred in refusing to grant Liz's motion for a directed verdict or judgment of dismissal when Paul failed to show a material change in circumstances and further failed to show an adverse affect to the best interests of the children. Paul only response is a cursory quote from *Sanderson v. Sanderson*, 824 So. 2d 623, 625-26 (Miss. 2002) that "a chancellor's findings will not be disturbed on appeal, which are supported by substantial evidence." However, as Liz abundantly demonstrated above in Parts I.1. and II.2., there was insufficient evidence to support the chancellor's finding that Paul met his burden of proof. Therefore, the chancellor erred in failing to grant Liz's motion for a directed verdict or a judgment of dismissal.

III. The chancellor erred and/or abused his discretion in his "*Albright* analysis" and in shifting primary physical custody of the minor children to Paul.

Neither party challenged the chancellor's findings with regard to the following *Albright* factors: (6) physical and mental health and age of the parents favored neither party; (8) moral fitness of the parents favored neither party; and (11) stability of the home environment and employment favored Liz. However, the chancellor abused in discretion in his analysis of the remaining *Albright* factors and in thereafter awarding Paul physical custody of children. (R. at 123-127; R.E. 00038-42.)

1. *Age, Health and Sex of the Children*

The chancellor erred in finding the age of the children favored neither parent because he failed to consider the sex of the children, which clearly favored Liz since these two teenage girls desperately needed the female guidance of their mother.[5] Paul argues that Liz implicitly admitted he was able to care for the children despite their being female because Liz admitted to allowing him additional time with the girls. (Appellee Br. 22.) It is true that Liz allowed Paul additional time with the children. However, this merely shows that Liz believed Paul was fit to care for the children so long as she was nearby and could provide the girls with much needed female guidance and support. Obviously, the children would suffer from a lack of guidance and support from their mother if they were left alone with Paul and Liz was no longer living nearby. Thus, Paul's argument rings hollow.

Paul attempts to argue that *Pruett v. Prinz*, 979 So. 2d 745, 751 (Miss. Ct. App. 2008) states that a parent is the most important role model a child has and "[a]s such, it is necessary to from a sex of child standpoint to look at what type of role model [Liz] is to them. (Appellee Br. 22.) Unfortunately for Paul, *Pruett v. Prinz* does not support that proposition and is easily distinguished. What the Court of Appeals found in *Pruett v. Prinz* was that the mother's behavior in persuading her son to assist her in hiding her affair with a married man supported the chancellor's findings with regard to adverse affect. *Pruett*, 979 So. 2d at 751. Even though *Pruett v. Prinz* does not support Paul's proposition, Paul nevertheless attempts to argue that the chancellor did not err in failing to favor Liz under this factor because Liz is not a good role model for the children. Paul is wrong.

First, the chancellor's opinion is devoid of any finding that Liz is not a good role model for

[5]For example, Ruth testified that when she and her boyfriend became sexually active, she shared this information only with her mother, woman to woman, because she was not comfortable sharing it with her father. (Tr. 135-136, 151; R.E. 00182-183, 00198.)

the children. More importantly, such a finding is not supported by the record. To the contrary, Liz is an excellent role model for the children. At the time of trial, Liz had remarried and had worked for Rehabilitation, Inc. for seven years. (Tr. 12, 42, 273-74; R.E. 00059, 00089, 00320-321.) Liz also attended to the children's medical needs and provided them with much needed guidance and discipline, even when Liz's disciplining of the children displeased them. *See* discussion in Appellant's Br. 25-27. Liz set an excellent example for the children by showing them how to succeed at being a wife, mother and professional. Clearly, Liz was an excellent role model, and Paul's argument to the contrary is unfounded. The chancellor erred in failing to favor Liz under this factor.

2. *Continuity of Care*

The chancellor erred in finding that this factor strongly favored Paul based on Paul and the children's unsupported statements that the children stayed with him about 65% of the time. (R. at 123-24; R.E. 00038-39.) At trial, Liz testified that shortly after the divorce, the parties deviated from the original custody arrangement, and thereafter, the children spent one week with her and then one week with Paul. (Tr. 269-270; R.E. 00316-317.) Liz therefore concluded that the children spent 50% of the time with each parent. On the other hand, Paul testified that the children lived with him 65% of the time but offered no explanation for how he arrived at this figure. (Tr. 36; R.E. 00083.) The chancellor erred in strongly favoring Paul based on his arbitrary calculation.

Paul claims that 65% is not an arbitrary number because in *Ellis v. Ellis*, 952 So. 2d 982, 997 (Miss. Ct. App. 2006), the Court of Appeals stated: "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." Paul takes this quotation out of context, and therefore, Paul's reliance on *Ellis* is misplaced. The *Ellis* Court noted that in weighing and counting the *Albright* factors in making a custody determination,

"they are certainly not the equivalent of a mathematical formula." Contrary to Paul's assertion, the quoted language from *Ellis* had nothing to do with determining how much time a child lived with each parent under the continuity of care factor.

Paul failed to justify his arbitrary calculation that the children lived with him 65% of the time. Thus, the chancellor erred in failing to find continuity of care to be a neutral factor when Liz testified the children were with each parent 50% of the time since custody alternated every week.

3. *Parenting Skills*

The chancellor erred in failing to favor Liz for her superior parenting skills in supervising and disciplining the children and in attending to their health needs. Liz testified that even though Paul was responsible for providing health insurance for the children, he failed to do so. Ultimately, Liz was forced to put the children on her health insurance, but Paul refused to reimburse her. (Tr. 284-85; R. at 021; R.E. 00007, 00331-332.) Paul claims: "the sole reason he was behind on health insurance payments was due to him losing his job after his employer fell on hard times." (Appellee Br. 25.) However, at the time of trial, Paul had a new job, and Paul claimed his financial condition "was vastly better" and his "prospects had improved significantly." (Appellee Br. 33.) If Paul's prospects were so good, then why had he not provided for the children's health insurance? The answer is that Paul has no interest in attending to the children's health needs, especially when it costs him money. Paul also applauds himself for reimbursing Liz for all outstanding insurance premiums and unpaid medical bills. (Appellee Br. 26.) Paul conveniently ignores that in the July 29, 2008 *Agreed Order*, the chancellor found Paul had failed to provide health insurance for the children and ordered Paul to reimburse Liz for the cost she incurred each month to maintain this coverage. (R. at 064-66; R.E. 00011-13.) Paul further ignores that even after the *Agreed Order*, Liz had to again file for contempt due to Paul's failure to provide coverage for the children and refusal to reimburse her,

as well as his refusal to pay the children's medical and dental bills. (R. at 093-096; R.E. 00022-25.) In fact, the only reason Paul was current on these expenses as of trial was because the chancellor found him in contempt and ordered him to pay $22,290.30 in arrearages or else be incarcerated. (Tr. 26-27; R. at 121; R.E. 00036, 00073-74.) Paul's actions overwhelmingly demonstrate he only cares about providing for his children when the only alterative is jail time.

In juxtaposition to Paul's failure to provide for the children, Liz demonstrated her superior parenting skills in attending to the children's health needs and in properly responding to the younger child Mary consorting with bad influences, wearing scandalous clothes, having multiple piercings, and burning her arms with bottle caps. (Appellant's Br. 26-27.) Paul implies his parenting skills are just as good as Liz's because he responded to the children's problems in the same way that Liz did. For example, Paul claims that when he learned that Liz had a problem with one of Mary's friends and wouldn't let Mary go to her house, then he no longer allowed Mary to go to her house either. (Appellee Br. 27.) However, Liz is clearly the proactive disciplinarian in the family, and Paul simply picks and chooses when he will follow Liz's lead in disciplining the children. For example, on one occasion when Liz grounded the older daughter Ruth, Paul chose to ignore Liz's disciplining of the children and instead interfered by allowing Ruth go to a friend's house. (Tr. 260-61; R.E. 00307-308). Clearly, Paul takes a lackadaisical approach to disciplining the children, at best.

Lastly, Paul resurrects his feeble argument he must not have possessed inadequate parenting skills because Liz allowed him additional time with the children. Paul continues to ignore that Liz had no problem allowing Paul additional time with the children when she was nearby and could provide them with much needed discipline and supervision. The chancellor abused his discretion in finding this factor favored Paul. Considering Liz's attention to the children's medical needs and her vigilance in supervising and disciplining the children, Liz clearly has the best parenting skills.

4. *Willingness and Capacity to Provide Primary Child Care*

The chancellor abused his discretion in failing to favor Liz under this factor for her superior capacity to financially provide for the children and Paul's repeated and consistent failure to do so.

Paul argues he is financially able and willing to provide for the children because: (1) DHS garnished his pay checks to pay his child support obligation, (2) he gave each child $50-75 a week for allowances, and (3) he is "back on his feet financially" and was able to pay $22,290 in court-ordered arrearages. (Appellee Br. 31-32.) Paul offers no explanation as to why he would give the children spending money each week but would not voluntarily pay child support to feed and clothe his children until forced to do so through involuntary garnishment or court order. It is astounding that Paul asks this Court to give him credit because he was able to pay $22,290 in arrears on August 5, 2009. Since Paul obviously had access to that amount of money, why wasn't he paying child support and why did he let those arrearages accumulate in the first place? The obvious answer is that Paul wasn't willing to provide for his children until the chancellor threatened him with incarceration.

Paul also states his financial condition had improved by the time of trial and was vastly better than Liz's. Paul claimed he recently received a raise, whereas Liz was having trouble making ends meet because business was slow. (Appellee Br. 33.) Paul ignores that his failure to pay child support and provide health insurance for the children exacerbated Liz's financial difficulties. (Tr. 326; R.E. 00373.) Paul also ignores that Liz's husband would be helping her financially. (Tr.327; R.E.00374.) Paul wholly failed to show he was financially willing or better able to provide for the children.

Paul also argued he has been the children's primary caregiver since the divorce and that his new job would allow him to be primary care giver in the future. (Appellee Br. 30.) First, Liz has already shown the parties equally cared for the children after the divorce. *See* discussion *supra* Part III.2. Second, Paul's assertion about his new job are eviscerated by his own admissions that: he

works 50 hour weeks, he would have to leave the younger child alone at times, and he would have to rely on family and his fiancée to care for the children when he could not. (Appellee Br. 32, 34-35.)

Paul has demonstrated an unwillingness to financially support the children. Paul has further demonstrated that his employment would not be conducive providing primary child care for Mary. In light of the foregoing, the chancellor erred in failing to favor Liz under this factor.

5. *Employment of the Parents and Responsibilities of that Employment*

The chancellor abused his discretion in failing to favor Liz under this factor when she had flexible hours and could work from home, whereas Paul worked long hours, would leave Mary alone for hours each day, and would have to rely on others to care for the children. (Appellant's Br. 31-35.)

Paul admits he would have to leave Mary home alone while he is at work. Liz testified she is concerned about where Mary would be in the afternoons if she lived with Paul, and that Mary has to rely on her friends and their mothers to help her when she is with Paul. (Tr. 286, 272; R.E. 00333, 00319.) Paul rebuts that Liz will have to leave the children with her new husband Lance when she travels out of town on business. (Appellee Br. 34-35.) While it is true Liz may occasionally travel out of town and leave the children with Lance, Paul will have to leave Mary unattended every day.

Paul has no response to the fact Liz has been with her current employer for seven years, whereas he had been recently unemployed for a year and had only a temporary construction job at the time of trial. Because Liz's employment was more stable and more conductive to providing primary child care, the chancellor abused his discretion in failing to find this factor favors Liz.

7. *Emotional Ties of Parent and Child*

Paul claims this factor favored him because the children have a close emotional tie and "[t]he bond between the parties' two children, Ruth and Mary, also transcended to their father." (Appellee Br. 36-37.) Paul cites to case law regarding our state's preference for keeping siblings together in

support of his argument that: "The Chancellor correctly noted that by having Husband gain physical custody, Ruth and Mary would be able to see each other every weekend." (Appellee Br. 37.) Paul is wrong. As previously stated in Part II.1., the children will see each other each exactly the same amount of time – every other weekend – regardless of who has custody. Therefore, the children's close emotional ties and the policy against separating siblings have no application in this case.

The Appellant's Brief amply demonstrated the children are more distant from Paul and much closer to Liz than the chancellor otherwise found.[6] Moreover, the children's negative attitude toward Liz was improperly motivated by Mary's anger at being asked to relocate and by Paul's lax approach to parenting. (Tr. 184, 267; R.E. 00231, 00314.) Paul's argument that Mary stated Liz "put a lot of stress on her and her sister" and that Mary and Liz fought merely supports Liz's contention that Mary was upset over being asked to relocate and that the children resisted Liz's efforts to discipline them.

Due to the inapplicability of the emotional ties between the children and the fact that the children were more distant from their father and closer to her than the chancellor otherwise found, the chancellor abused his discretion in holding the emotional ties factor favored Paul.

9. *Home, School and Community Record of the Children*

The chancellor abused his discretion in finding this factor favored Paul due to the children's ties to Saltillo. It is undisputed the children did well in Saltillo when both parents were present and actively involved in the children's lives. However, nothing indicated Mary would do poorly in Ocean Springs or that she would continue to do well in Saltillo without her mother. Paul argued Mary had ties to Saltillo in that she was in a gifted art class and had arrangements to work part-time at a local

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[6]For example, neither child knew their father was engaged until they discovered this information at trial, and Mary did not know the details about where her father worked. (Tr. 99, 176, 178, 186; R.E. 00146, 00223, 00225, 00233.) Ruth also shared only with her mother that she had been sexually active and the children confided personal issues to Liz. (Tr. 135-36, 151, 267; R.E. 00182-183, 00198; 00314.)

movie theater. (Appellee Br. 39). However, during Mary's summer visit to Ocean Springs, Liz tried to get Mary involved in a volunteer art class. Liz also helped Mary get certified to be a lifeguard in Ocean Springs, but Mary was resistant because she didn't want to move. (Tr. 266; R.E. 00313). Mary's participation in an art class and having a part-time job in Saltillo should not weigh in Paul's favor when Mary had the same opportunities in Ocean Springs. Likewise, Ruth's plans to return to Saltillo each weekend to work at a local pharmacy, (Tr. 32; R.E. 00079), should not weigh in either party's favor when Ruth could have obtained employment in Ocean Springs. The paramount concern should be what is in the children's best interests – which is for them to remain with Liz.

Paul also argues that Mary was unhappy when she visited Ocean Springs over the summer, that Mary didn't want to leave her friends in Saltillo and that she felt like she didn't have anyone to turn to in Ocean Springs. (Appellee Br. 40.) As previously stated in Part II.2., Mary's self-induced unhappiness in Ocean Springs and her refusal to make new friends is not a reason to modify custody and should also not be weighed against Liz in the *Albright* analysis. Paul wholly failed to rebut Liz's showing that the chancellor erred in his analysis under this factor.

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

The chancellor abused his discretion in finding this factor strongly favored Paul based on the children's preference to remain together and with Paul. First, the children's preference to remain together is inapplicable as they will see each other the same amount of time regardless of who has custody. *See* discussion *supra* Part II.1. Second, the Appellant's Brief at pages 37-39 demonstrates that the children's preference to remain with Paul is improperly motivated by the children's desire to remain in Saltillo, and not necessarily to remain with Paul. The children are further motivated by Mary's feelings of guilt over leaving Paul and Ruth's desire for a custody arrangement convenient for her. The children's preference to remain with Paul is also highly influenced by Paul's lax attitude

toward discipline and supervision. Despite the testimony at trial recited in the Appellant's Brief, Paul attempts to dismiss Liz's argument as "unsupported" and "conjecture." (Appellee Br. 43.) Paul also makes a feeble argument that Liz is not interested in having a good relationship with the children because she has not supported the children's preference to remain in Saltillo. (Appellee Br. 43.) Paul is wrong. Clearly, Liz understands something Paul does not: that being a good parent sometimes means doing what is best for your children even though it may not be what they want.

Based on the inapplicability of the separation of siblings doctrine and the children's improper motivations, the chancellor should not have afforded the children's preference such weight in his *Albright* analysis. The chancellor abused his discretion in finding this factor strongly favored Paul.

12. *Other Factors*

The chancellor implicitly weighed these "other factors" against Liz: (1) the move was not mandatory; (2) the children did not want to be separated; and (3) Liz made inconsistent statements about her income and contradicted some of the children's testimony. (R. at 126; R.E. 00041.)

With regard to the first "other factor", Paul claims that Liz relocated so that her husband could be near his son in Ocean Springs and that "appellate courts are primarily concerned with whether the relocation was for a legitimate professional opportunity." (Appellee Br. 45.) This argument has already been wholly discounted above in Part II.1. As stated therein, Liz's motivations for relocating should not have been a factor in modifying custody, and in any event, Liz's relocation was properly motivated by both social and economic considerations. Therefore, the chancellor abused his discretion in finding that Liz's decision to relocate weighed against her.

Much ado has been made about the second "other factor"–the separation of the siblings. Paul claims that if Mary stated in Saltillo with him, then the children will see each other every weekend at his house, but that if Mary lived in Ocean Springs, the children would seldom see each other.

(Appellee Br. 46.) This is blatantly false. As stated above in Part II.1., regardless of who has custody, Mary will spend one weekend in Ocean Springs and the next weekend in Saltillo. Therefore, Mary will only see her sister on alternating weekends in Saltillo. The separation experienced by the siblings is exactly the same regardless of who has custody, and that doctrine is wholly inapplicable in the present case. Thus, the chancellor abused his discretion is weighing this factor against Liz.

With regard to the third "other factor," both parties concede the chancellor has the right to weigh the credibility of the witnesses and to factor this into his *Albright* analysis by determining what testimony is credible. However, Paul points to no cases wherein it is held that credibility is an independent *Albright* factor to be weighed against a parent in awarding custody. That is because credibility is not an *Albright* factor. Therefore, the chancellor abused his discretion in finding Liz's credibility was an independent *Albright* factor and in weighing this against her.

In sum, neither party challenged the chancellor's findings with regard to three of the *Albright* factors: physical, mental health and age of the parents; moral fitness of the parents; and stability of the home environment and employment. However, the chancellor abused his discretion in his analysis of the other *Albright* factors. As a result, the chancellor abused his discretion in shifting physical custody to Paul and in failing to find it was in the children's best interest to remain with Liz.

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

The chancellor erred in awarding child support in the amount of 20 percent of Liz's adjusted gross income because he failed to make written findings as to the reasonableness of applying the child support guidelines under MISS. CODE ANN. § 43-19-101(4) and because he failed to consider facts in the record which indicate that a lower amount of child support was more appropriate.

Regarding the required findings, the legislature enacted the following statute: "In cases in

which the adjusted gross income as defined in this section is more than Fifty Thousand Dollars ($ 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." MISS. CODE ANN. § 43-19-101(4). Even though the chancellor made no such written finding, Paul argued: "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." (Appellee Br. 48.) Paul's argument defies logic. If Paul is to be believed, then the legislature's mandate that a court shall make a written finding would be utterly meaningless. Moreover, the Appellant's Brief cites to numerous cases where a non-custodial parent with an adjusted gross income over $50,000 was ordered to pay less than the statutory percentage. (Appellant Br. 46-47.) Paul attempts to distinguish these authorities by claiming in those cases the payor had income that was substantially more than the statutory guidelines. However, in enacting this statute, the legislature made a bright line rule requiring written findings in cases where the non-custodial parent's adjusted gross income exceeds $50,000. No where in the statute does it refer to a non-custodial parent's adjusted gross income being "substantially more" than $50,000. The chancellor erred in failing to make the required findings as to reasonableness of applying the child support guidelines, and in fact, the amount of child support awarded was not reasonable.

In the Appellant's Brief, Liz demonstrated that a lower child support award was more appropriate considering that her adjusted gross income exceeded $50,000 and considering the statutory criteria for deviating from the child support guidelines, including: that Liz was obligated to pay 50% of the children's uncovered medical and college expenses, that the older child, Ruth, only physically resided with Paul on the weekends, and Ruth's independent income. Paul admits that Ruth works at a pharmacy on the weekends but claims that it's hard to determine how her earnings would

impact her financial needs. Paul also bemoans the lack of proof: "Wife did not offer any proof as to what Ruth's income would be at the pharmacy...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." (Appellee Br. 49.) Liz agrees there was inadequate proof with regard to how much Ruth's independent income would lessen her need for child support. Liz further agrees there was inadequate proof regarding what expenses would be covered by Ruth's scholarships and student loan – for example, whether they would cover tuition, books, meal plans, and dormitory fees and thereby lessen Ruth's need for child support. This lack of proof about the children's needs simply goes to show that the record does not support the child support award. Moreover, Paul's argument regarding the lack of proof fails to acknowledge that he was the moving party requesting child support and, therefore, the lack of proof regarding the children's needs and the reasonableness of the child support award is attributable to him.

Paul makes a last ditch argument that the chancellor "agreed to allow the record to remain open to allow additional proof. The Wife never provided any such information." (Appellee Br. 49.) Paul's statement is misleading at best. After awarding child support, the chancellor actually stated:

> ... I based that on Exhibit 4, which was her statement of earnings, not the Rule 8.05. It did not take into consideration whether or not some of her withholdings are mandatory....Now, if you can show me and you of counsel can agree that it is mandatory, I will readjust those figures accordingly to the 20 per cent....

(Tr. 357; R.E. 00404.) As this quote shows, the record remained open for additional proof of Liz's adjusted gross income, not additional proof of the children's needs or the appropriateness of applying the statutory guidelines. In fact, the chancellor clearly stated that he planned to apply the 20 percent figure to whatever Liz's adjusted gross income turned out to be. That clearly shows a disregard for the children's needs and the reasonableness of the child support amount.

In sum, the chancellor erred in failing to make written findings as to the reasonableness of applying the statutory child support guidelines as required by MISS. CODE ANN. § 43-19-101(4). The chancellor also erred in ordering an amount of child support that was unreasonable under the circumstances and without adequate proof to support it.

CONCLUSION

The focus of this litigation was Liz's relocation and Mary's separation from her older sister who was going away to college. However, neither were a sufficient basis for modifying custody and modification was not in the children's best interest. The chancellor erred in the following respects: in denying Liz's motion for continuance, in finding Paul had met his burden of proving a material change in circumstances that adversely affected the best interest of the children, in his *Albright* analysis and his resulting decision to award physical custody to Paul, and in his child support award.

The judgment of the Lee County Chancery Court should be reversed and rendered, thereby restoring sole physical custody to Liz. Alternatively, the Court's child support award should be reversed and remanded for a recalculation of Liz's support obligations, retroactive to the date of trial.

Respectfully submitted, this the 26 day of July, 2010.

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CERTIFICATE OF SERVICE

I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing *Reply Brief of Appellant* to the following persons:

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SO CERTIFIED this the 26 day of JULY, 2010.

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