IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARY ELIZABETH BROWN ROBINSON	APPELLANT
VS.	NO. 2009-CA-01599
PAUL ARTHUR BROWN	APPELLEE

APPEAL FROM THE CHANCERY COURT
OF LEE COUNTY

BRIEF OF APPELLANT

COUNSEL FOR APPELLANT:

WILLIAM R. WRIGHT (MS [redacted]
W. BENTON GREGG (MS [redacted]
TRHESA B. PATTERSON (MS [redacted]
AMANDA JANE PROCTOR (MS [redacted]

WRIGHT LAW FIRM, P.A.
1062 Highland Colony Parkway
200 Concourse, Suite 250
Ridgeland, MS 39157
Post Office Box 12745
Jackson, Mississippi 39236
Telephone: (601) 366-8090
Facsimile: (601) 366-3080

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 3rd day of March, 2010.

Attorneys of Record for Appellant

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II. Whether the chancellor erred in finding that the Appellee 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.

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

STATEMENT OF THE CASE

a. *Nature of the Case, the Course of the Proceedings, and its Disposition in the Court Below.*

These parties were divorced on July 29, 2002. The *Final Judgment of Divorce* approved and incorporated the parties' agreement of joint legal custody of their two teen-aged children, Ruth and Mary. The parties further agreed that the Appellant, "Liz", would have primary physical custody, subject to the Appellee, "Paul's", visitation rights.

Liz has since remarried. Her husband, Lance Robinson, lives in Ocean Springs, Mississippi. In the summer of 2009, Liz moved to Ocean Springs to be with her husband. In response to Liz's relocation, Paul filed a *Motion for Modification of Child Custody and for Other Relief,* seeking primary physical custody. On July 3, 2009, Liz filed her *Answer to Motion for Modification of Child Custody* and a *Counter-Complaint for Citation of Contempt and Other Relief.* On July 10, 2009, Paul filed his *Answer to Counter-Complaint for Citation for Contempt of Court and for Other Relief.*

Paul's *Motion for Modification* and the resulting trial were based on Liz's relocation, and the children's preference to remain in Lee County with their father. After a trial over one and a half days, the chancellor concluded that physical custody should be granted to Paul. This is an appeal

from the court's *Order* terminating Liz's primary physical custody rights and awarding them to Paul.

Liz contends here that the chancellor erred in several ways, including his denial of her motion for a continuance when Paul served his discovery responses on the morning of trial, his finding that Paul met his burden of proving that there was a substantial and material change in circumstances that adversely affected the best interest of the children, in his "*Albright* analysis," which resulted in his shifting physical custody of the children from Liz to Paul, and in his award of child support.

b. *Statement of Facts.*

Liz and Paul were married on September 5, 1987. Their older child, Ruth, was born on September 9, 1990. Their younger child, Mary, was born on February 3, 1994.

On July 29, 2002, the Chancery Court of Lee County, Mississippi entered its *Final Judgment of Divorce* which incorporated the parties' agreement regarding child custody, child support, visitation, and other related matters. (Record at 018-019; Record Excerpts 00004-00005.)

Pursuant to the parties' agreement, child custody was awarded as follows: "That the parties shall have joint legal custody of the minor children, namely: Ruth Elizabeth Brown and Mary Rachel Brown, with Mary Elizabeth Brown to have primary physical custody." (R. at 019; R.E. 00005.) The agreement also provided that Paul shall pay Liz the sum of $475.00 per month for child support. (R. at 020; R.E. 00006.) Paul was further ordered to maintain health and dental insurance coverage on the minor children, and the parties agreed to equally divide all uncovered medical, dental, and prescription medicine expenses. (R. at 021; R.E. 00007.) The parties also agreed to each be responsible for paying one-half of any and all reasonable tuition and fees incurred on behalf of the minor children to receive a college education. (R. at 022; R.E. 00008.)

On July 29, 2008, the chancellor entered an *Agreed Order* finding: Paul was $7,238.00 in arrears in child support, Paul had failed to provide health insurance for the children, Paul had failed

to pay $6,512.00 for the children's medical and dental bills, and Paul should be responsible for $1,250 of the attorneys' fees incurred by Liz in bringing the matter before the court. (R. at 064; R.E. 00011.) Liz was awarded a judgment against Paul in the amount of $15,000.00, plus interest at the rate of eight percent per annum. (R. at 065; R.E. 00012.) Paul was ordered to pay a lump sum of $2,500 within 45 days of the entry of the *Order*. Thereafter, Paul was ordered to pay $200.00 per month, and to provide Liz with copies of his income tax returns each year until the judgment was fully satisfied. (R. at 065; R.E. 00012.) Paul was also ordered to reimburse Liz for the cost that she incurred each month to maintain insurance coverage for the children until such time as Paul provided proof that he had obtained insurance coverage on the children. (R. at 066; R.E. 00013.) Finally, Paul was ordered to pay Liz the sum of $561.12 per month in child support. (R. at 065; R.E. 00012.)

At the time of the divorce, Liz was a registered nurse and a case manager for Genex. (Trial Tr. 289, Aug. 4-5, 2009; R.E. 00336.) After the divorce, Liz traveled occasionally on business and to improve her earning capacity. Liz also attended classes through the University of Florida to become a certified lifecare planner, and she received additional certifications as a Medicare set aside consultant and a professional coder. (Tr. 289; R.E. 00336.)

Liz met her current husband, Lance Robinson, through her employment. (Tr. 296; R.E. 00343.) Liz has known Lance as a business associate for over ten years, and five years ago, she went to work for the same company as Lance – Rehabilitation Inc. (Tr. 273-274; R.E. 00320-00321.) Liz and Lance dated for two years, and they married on June 5, 2009. (Tr. 12, 274; R.E. 00059, 00321.)

Prior to their marriage, Liz had a long distance relationship with Lance, who has lived in Ocean Springs most of his life. (Tr. 301; R.E. 00348.) Lance also has a five-year-old child from a previous relationship who lives in that area. (Tr. 301; R.E. 00348.) In the summer of 2009, Liz moved to Ocean Springs to be with her new husband. Paul was aware of Liz's intention to relocate

for eight or nine months before she moved. (Tr. 56; R.E. 00103.) While Liz often works from home, she and Lance also have an office near their home in Ocean Springs. (Tr. 273, 301; R.E. 00320, 00348.) Liz's older daughter, Ruth, began college at the University for Women in the fall of 2009. (Tr. 92; R.E. 00139.) However, Liz planned to take her younger daughter, Mary, to Ocean Springs to live with her and Lance. Liz made numerous efforts during the summer of 2009 to get Mary excited about the relocation and to ease the transition. (Tr. 265-267; R.E. 00312-314.) Mary rejected these efforts and stated she preferred to remain in Lee County with her father. (Tr. 163; R.E. 00210.)

In response to Liz's relocation, Paul filed a *Motion for Modification of Child Custody and for Other Relief*, requesting primary physical custody of the minor children. Paul's *Motion* specifically alleged that there had been a material change in circumstances adverse to the best interests of the parties' minor children based on the following:

> Defendant, Mary Elizabeth Brown, has recently remarried and is planning 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 eighteen (18) years old and fifteen (15) years old, respectively, and would prefer to live with the Plaintiff [Paul]. 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.)

Liz filed an *Answer to Motion for Modification of Child Custody and for Other Relief*, which denied that modification of custody was warranted and raised affirmative defenses of unclean hands and a motion to dismiss pursuant to MISS. R. CIV. PRO. 12(b)(6). (R. at 091-092; R.E. 00020-00021.) Liz also filed a *Counter-Complaint for Citation of Contempt and Other Relief*, alleging Paul was in contempt of court for his refusal to pay child support, his refusal to maintain health insurance coverage on the minor children or to reimburse Liz for the cost she incurred in maintaining insurance coverage, his refusal to pay medical and dental bills incurred by the children, and his failure to pay

the children's college expenses. (R. at 093-096; R.E. 00022-00025.) On July 10, 2009, Paul filed his *Answer to Counter-Complaint for Citation for Contempt of Court and for Other Relief*, wherein he denied Liz's allegations that he was in contempt of court. (R. at 110; R.E. 00031.)

The case was originally set for a hearing on July 22, 2009; however, Liz's counsel filed a *Motion for Continuance*, citing a scheduling conflict and Liz's need for additional time to conduct discovery in order to prepare for trial. (R. at 100; Tr. 3; R.E. 00027, 00050.) On July 6, 2009, Liz propounded her *First Set of Interrogatories and Requests for Production of Documents and/or Tangible Things* to Paul. (R. at 105; R.E. 00029.) The parties had agreed to expedite the discovery process and to quickly set the case for trial, especially since the issues involved where the children would attend school that fall. (Tr. 3, 4-5; R.E. 00050, 00051-00052.) Paul's counsel served his discovery responses by faxing them to Liz's counsel at 10:52 a.m. on the first day of trial. (Tr. 3-4; R.E. 00050-00051.) The trial commenced at 1:40 p.m. that same day. (Tr. 1, R.E. 00044.)

The case was tried on August 4 and 5, 2009. At the commencement of trial, Liz's counsel testified that he had not had sufficient time to review Paul's discovery responses with his client, and that there were issues raised in Paul's responses that they were not prepared to respond to with only a few hours notice. (Tr. 4, 6; R.E. 00051, 00053.) Liz also testified that she was able to only very briefly review the financial documents provided that morning by Paul in his discovery responses. (Tr. 23; R.E. 00070.) Liz's counsel asked for a continuance so that he could be fully prepared for trial. (Tr. 4; R.E. 00051.) Paul's counsel asked the court to deny the continuance, alleging he had fully discussed their discovery responses with Liz's counsel the day before trial, that nothing unexpected was in their responses, and that school was scheduled to begin that Thursday. (Tr. 5; R.E. 00052.) The chancellor overruled Liz's motion for a continuance, in part because school was starting that Thursday and because change of custody was an issue. (Tr. 7; R.E. 00054.)

The court then addressed Liz's defense of unclean hands and her allegation that Paul was in contempt of court. Paul confessed that he was in contempt of the July 29, 2008 *Agreed Order* for not timely paying the lump sum of $2,500.[1] (Tr. 8; R.E. 00055.) The parties stipulated that as of August 4, 2009, Paul was in arrears in the sum of $22,290.30,[2] which included interest and additional attorneys fees. (Tr. 24-25; R. at 121; R.E. 00036, 00071-00072.) The court found Paul in contempt of court and ordered him to pay $22,290.30 by 4:00 p.m. on August 5, 2009, plus a $100 fine.[3] (Tr. 26; R. at 121; R.E. 00036, 00073.) The Court then denied Liz's motion to dismiss based on the doctrine of unclean hands and proceeded with the complaint for modification.[4] (Tr. 27; R.E. 00074.)

The remainder of the trial dealt with Paul's *Motion for Modification of Child Custody* and focused on Liz's relocation to Ocean Springs. As the chancellor stated post-trial:

> this Court finds by clear and convincing evidence that a substantial and material change in circumstances has occurred, to-wit, that the defendant/counter plaintiff moving to Ocean Springs seeking to take the children with her, the testimony is clear that the actions testified to have or likely will harm the children by increased anxiety and depression caused by their unnecessary uprooting from all that they know and love and that they are forced to move.

(Tr. 349-350; R.E. 00396-000397.) Paul cited Liz's relocation in his *Motion for Modification* as the reason for the children's preference to remain with him in Lee County. Liz's position was that the

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[1]Instead, Paul admitted he had only paid $500, and that he paid an additional $1,500 on the day of trial. (Tr. 8, R.E. 00055.)

[2]This amount did not include college expenses for the parties' older daughter, Ruth, who would begin college that fall. (Tr. 18-19, 24; R.E. 00065-00066, 00071.)

[3]The Court ordered that Paul be incarcerated for his contempt, but held this in abeyance contingent upon him paying the judgment in full by 4:00 p.m. on August 5, 2009. (Tr. 26-27; R. at 121; R.E. 00036, 00073-00074.)

[4] At the conclusion of the trial, after Paul tendered a check in the appropriate amount, the court found Paul had purged himself of his contempt, assuming the check was good, and dismissed Liz's defenses of unclean hands and her motion to dismiss. (Tr. 348; R.E. 00395.)

only change since the divorce was her relocation to Ocean Springs and that her relocation was not a material change justifying modification of custody. (Tr. 203-204; 294; R.E. 00250-00251, 00341.) The parties' older child, Ruth, admitted at trial that the only change since the divorce was her mother's relocation. (Tr. 157; R.E. 00204.) Ruth further admitted the most important issue for her sister, Mary, was the relocation from Saltillo, Lee County to Ocean Springs. (Tr. 109; R.E. 00156.)

At trial, Paul alleged a material change in circumstances had occurred in that the children preferred to remain with him and that Liz had remarried and moved to Ocean Springs. (Tr. 30-32; R.E. 00077-00079.) Paul testified that requiring Mary to move to Ocean Springs would devastate her because Ruth would not be able to drive down every weekend from Columbus to see her. (Tr. 33; R.E. 00080.) Mary similarly testified that it would break her heart if she were six hours away from her sister. (Tr. 169; R.E. 00216.) Also, Mary testified she wanted to finish out her last three years of high school in Saltillo and wanted to remain with her father, family, friends and school. (Tr. 163, 170, 179; R.E. 00210, 00217, 00226.) Although Mary spent three weeks over the summer with her mother in Ocean Springs, she said she was miserable during that time. (Tr. 166; R.E. 00213.)

Following trial, the chancellor issued his *Order* on August 28, 2009. That *Order* stated:

> That this Court has reached its determination of changes, since the divorce, based on all of the above,[5] and accordingly, the Court finds by clear and convincing evidence

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[5] In the preceding paragraphs, the chancellor found:

> That both children have expressed their preference to be with their father, the Plaintiff/Counter-Defendant, and not their mother, the Defendant/Counter-Plaintiff, who has remarried and moved from Lee County, Mississippi, to Ocean Springs, Mississippi, to be where her current husband, Lance Robinson, could be near his five-year-old child from a previous marriage. That the Defendant/Counter-Plaintiff nor her husband's employment required this move.
>
> 14.
>
> That the court is well aware that the mere unhappiness of a child is not sufficient to justify a change of custody and that in order to successfully modify an existing custody order, a party must show that there has been a substantial and material change in

> that ***a substantial and material change in circumstances has occurred, to-wit, that the Defendant/Counter-Plaintiff moving to Ocean Springs*** seeking to take the children with her, the testimony is clear that the actions testified to have or likely will harm the children by increased anxiety and depression cause by their unnecessary uprooting from all that they know and love and that they are forced to move.

(R. at 123; R.E. 00038) (emphasis added.)

After summarily concluding that Liz's relocation constituted a substantial and material change in circumstances, the chancellor conducted a best interest of the child analysis under *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). (R. at 123-127; R.E. 00038-42.) Thereafter, the court concluded that physical custody should be modified to be granted to Paul. The court also ordered Liz to pay child support at twenty percent (20%) of her adjusted gross income. (R. at 127; R.E. 00042.)

On September 24, 2009, Liz filed her *Notice of Appeal*.

STANDARD OF REVIEW

An appellate court "may reverse a chancellor's decision only if it is manifestly wrong or clearly erroneous, or if the chancellor applied an erroneous legal standard." *Staggs v. Staggs*, 919 So. 2d 112, 115 (Miss. Ct. App. 2005) (citing *Brocato v. Brocato,* 731 So. 2d 1138, 1140 (Miss. 1999)); *see also Lambert v. Lambert*, 872 So. 2d 679, 683 (Miss. Ct. App. 2003).

As to findings of fact, the appellate court reviews for abuse of discretion. *Marter v. Marter*, 914 So.2d 743, 746 (Miss. Ct. App. 2005) (citing *Rogers v. Morin*, 791 So. 2d 815, 826

> circumstances which adversely affects the welfare of the child and the best interest of the child to require the change the [sic] custody.
>
> 15.
>
> That this Court must and has looked at the totality of the circumstances in the best interest of both of the children, which best interest is at the polestar consideration in reaching its determination and that remarriage itself does not constitute a material change in circumstances that would justify a change of custody, nor does a simple move, which the Defendant/Counter-Plaintiff had every right to do.

(R. at 122; R.E. 00037.)

(Miss. 2001)). "[A]s to questions of law, an appellate court reviews *de novo* whether the trial court applied the proper legal standard in deciding a custody modification request." *Id.* (citing *Morgan v. West*, 812 So.2d 987, 990 (Miss. 2002)). It is not sufficient that a chancellor state the correct legal standard; the chancellor must also apply that standard appropriately. *See id.* at 747.

SUMMARY OF THE ARGUMENT

A. The chancellor erred in failing to grant Liz a continuance. Paul failed to serve his discovery responses until the morning of the first day of trial. Liz did not have an adequate opportunity to review Paul's responses. As a result, Liz was unprepared for trial. She was unable to adequately respond to new allegations that Paul revealed in his responses and to new testimony that arose at trial. The chancellor abused his discretion is denying Liz's motion for a continuance, and Liz suffered prejudice as a result of the denial.

B. The traditional test for modification of custody requires that the moving party demonstrate, by a preponderance of evidence, a material change in circumstances in the custodial parent's home that adversely affects the welfare of the children. After that burden has been met, the moving party must show that modification of custody is in the best interest of the children.

Under Mississippi law, when one parent has sole physical custody, the custodial parent's relocation does not constitute a material change in circumstances justifying a modification of custody. The chancellor erred in finding Paul had met his burden of proving a material and substantial change in circumstances based on Liz's relocation to another part of the state.

The chancellor further erred in finding Paul had met his burden of proving an adverse affect on the best interest of the children. The parties' younger child Mary expressed unhappiness during her three week visit to Ocean Springs with her mother, and Mary further stated her desire to remain in her hometown of Saltillo. However, a child's reluctance to move is typical in

relocation cases and does not satisfy Paul's burden of proving adverse affect. Because Mary never moved to Ocean Springs, Paul and the children could only speculate as to potential adverse affect. Therefore, the chancellor erred in finding that Paul had met his burden of proving a material change in circumstances and adverse affect so that custody modification was warranted.

C. After erroneously determining that Paul had demonstrated a material change in circumstances and adverse affect, the chancellor proceeded to an *Albright* analysis and thereafter shifted physical custody of the children to Paul. The chancellor abused his discretion in his analysis of all but three *Albright* factors. As a result, the chancellor abused his discretion in awarding physical custody to Paul. The record reveals that it was in the best interest of the children that Liz retain physical custody of the minor children.

D. After shifting physical custody of the children to Paul, the chancellor summarily ordered Liz to pay child support in the amount 20 percent of her adjusted gross income, which exceeded $50,000. In so doing, the chancellor erred in failing to make written findings as to the reasonableness of applying the child support guidelines to a parent whose adjusted gross income exceeded $50,000 as required by MISS. CODE ANN. § 43-19-101(4). The chancellor further erred in ordering an amount of child support that was unreasonable under the circumstances.

ARGUMENT

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.

At the commencement of trial, Liz moved for a continuance on the ground that Paul had not served his discovery responses until the morning of trial. The chancellor abused his discretion in denying the motion, and Liz was prejudiced as a result of the denial.

Under Mississippi law, "[t]he decision to grant or deny a continuance is within the sound

discretion of the trial court and will not be reversed absent an abuse of discretion that resulted in a manifest injustice." *Pool v. Pool*, 989 So. 2d 920, 924 (Miss. Ct. App. 2008). Reversal of a denial of a continuances requires that prejudice resulted. *Id.* at 924-25 (citing *Cherry v. Hawkins*, 243 Miss. 392, 397, 137 So. 2d 815, 816 (1962)).

One Mississippi Supreme Court case, *Schepens v. Schepens*, presented circumstances similar to this case. In *Schepens*, the wife appealed the chancellor's award of custody to the husband when the husband filed his answers to her second set of interrogatories only four days prior to trial, and the wife's motion for a continuance was denied. *Schepens v. Schepens*, 592 So.2d 108,108-09 (Miss. 1991). The wife argued that two of the witnesses listed in her husband's discovery responses were a surprise to her, and that her attorney was unable to interview those witnesses prior to trial. *Id.* at 109. Even though the wife had not shown prejudice by the denial of a continuance, the Supreme Court found that the wife's "lack of an opportunity to prepare for the two adverse non-family witnesses could have affected the evidence presented and, necessarily the chancellor's decision." *Id.* at 109-10. The Supreme Court vacated the chancellor's custody award and remanded for additional testimony regarding the children's best interest. *Id.* at 110.

In a criminal case, *Stewart v. State*, the defendant was denied a continuance when the State first provided discovery one day before trial, and thereafter, the defendant was convicted of kidnaping. *Stewart v. State*, 512 So. 2d 889, 890-91 (Miss. 1987). At trial, the State opposed the motion, arguing "we went over every witness for the State and told him yesterday that they would testify to, which obviously we do not have to do." *Id.* at 891. On appeal, the Mississippi Supreme Court reversed the defendant's conviction and remanded for a new trial, finding that the trial court's denial of a continuance was not harmless error. *Id.* at 893. The Supreme Court stated:

Ideally, discovery should proceed equitably and contemporaneously...here we do

> not deal with previously undisclosed evidence the attempt to introduce which surprises the defendant at trial. We think, however, that even the most meticulous disclosure is useless if not timely. *Discovery, to be sufficient, must be made at a time far enough in advance of trial to give the defense a "meaningful opportunity" to make use of it.*

Id. at 892 (emphasis added). *See also Foster v. State*, 484 So. 2d 1009 (Miss. 1986) (conviction reversed and case remanded for new trial because trial court denied a continuance when prosecution did not reveal the name of a confidential informant until 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 made five months earlier).

As in the above cases, the chancellor in this case erred in denying Liz's motion for a continuance. Paul served his discovery responses at 10:52 a.m. on the first day of trial. (Tr. 3-4; R.E. 00050-00051.) As a result, Liz did not have sufficient time to review Paul's discovery responses, and she was not prepared to proceed with trial nor to address the issues raised in his responses. (Tr. 4, 6, 23; R.E. 00051, 00053, 00070.) Liz had only a few hours to review Paul's discovery responses, which is significantly less time than the four days time in *Schepens* and the one day in *Stewart*. As in those cases, the chancellor erred in denying a continuance.

At trial, Paul argued that the parties' counsel had discussed his discovery responses the day before trial and that nothing unexpected was in his responses. (Tr. 5; R.E. 00052.) The chancellor denied Liz's motion for a continuance in part because custody modification was an issue and school was scheduled to start that week. (Tr. 7; R.E. 00054.) Assuming, *in arguendo*, that Paul's allegations are correct, the chancellor still should have granted a continuance. These circumstances are strikingly similar to *Stewart*, where discovery responses were served on the defendant one day before trial and where the State averred "we went over every witness for the

State and told him yesterday that they would testify to, which obviously we do not have to do." *Stewart*, 512 So. 2d at 891. As in *Stewart*, the chancellor erred in denying a continuance. Paul's service of discovery responses shortly before trial did not give Liz a "meaningful opportunity" to prepare for trial. The issue of school starting should not negate Liz's right to a fair trial.

In fact, the trial transcript reveals the prejudice Liz suffered and how unprepared Liz was to defend against Paul's allegations with only a few hours notice of his discovery responses. It is undisputed that Liz's drinking habits and her overnight male guests were major issues at trial. However, neither of the children indicated a concern with these issues when Liz's counsel interviewed them prior to trial. (Tr. 108, 199, 280, 282; R.E. 00155, 00246, 00327, 00329.) Prior to trial, Ruth indicated the real issue in this case was Liz's relocation to the Gulf Coast. (Tr. 108, R.E. 00155.) Ruth further stated prior to trial that if her father was the one relocating, then she would want to stay with her mother in Saltillo. (Tr. 109; R.E. 00156.) Prior to trial, Mary told Liz's counsel the same thing, but she then changed her story at trial. (Tr. 183; R.E. 00230.) Liz was certainly surprised by these new allegations raised at trial. Like in *Schepens*, where the wife was unable to prepare for two adverse witnesses on only four days notice, Liz was unable to prepare for the new allegations made by key witnesses, the parties' two children, on only a few hours notice. Here, as in *Schepens*, the chancellor erred in denying a continuance.

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.

A. *The Burden of Proof and the Traditional Standard of Modification*

"When a parent requests a change of custody, he must show by a preponderance of the evidence that, since the entry of the last decree sought to be modified, there must be a material change in circumstances that adversely affects the welfare of the child." *Staggs v. Staggs*, 919

So. 2d 112, 115 (Miss. Ct. App. 2005) (citing *Ash v. Ash,* 622 So. 2d 1264, 1266 (Miss. 1990)). "Once the party has shown that an adverse change has occurred, the party must show that the best interest of the child requires the change of custody." *Id.* (citing *Pace v. Owens,* 511 So. 2d 489, 490 (Miss. 1987)). However, "in all child custody cases, the polestar consideration is the best interest of the child." *Lambert v. Lambert*, 872 So. 2d 679, 684 (Miss. Ct. App. 2003) (citing *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss.1994)).

B. *Geographical Relocation Cases*

Under Mississippi law, it is well-established that the relocation of a parent with primary physical custody does not constitute a material change in circumstances justifying modification of custody. *See Bell v. Bell*, 572 So. 2d 841, 846 (Miss. 1990), *as modified*, 89-CA-1108 (Miss. 1990) (finding "[t]hat a parent moves is certainly not per se a material change in circumstances," and affirming trial court's decision to allow mother her to relocate with child); *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 in circumstances); *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 in circumstances 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 in circumstances).

In *Pearson v. Pearson*, a father was awarded primary custody of his children at the time of the divorce, and thereafter, he learned he would be relocating due to his job being transferred

to Hawaii. *Pearson v. Pearson*, 458 So. 2d 711, 713 (Miss. 1984). The chancellor modified the divorce decree and granted custody to the mother, finding that the father's relocation was a material change in circumstances which would adversely affect the children. *Id.* The chancellor based his decision on the fact that the father's relocation would deprive the mother of her visitation rights. *Id.* The chancellor also inferred, without so stating, that the relocation would adversely affect the children. *Id.* The Mississippi Supreme Court reversed and rendered, holding:

> where one spouse has custody of children under a divorce decree and their employment or livelihood requires that they move or be transferred to another state of this nation, that this does not constitute a change in circumstances which would adversely affect the children, under ordinary conditions, even though it might cause a hardship on the other spouse with regard to existing visitation privileges.

Id. at 713-14.

In a similar case, *Lambert v. Lambert*, the parties agreed during their divorce that the mother would have primary physical custody of their child, and thereafter, the mother relocated from Hattiesburg to Batesville, Mississippi, for better employment opportunities. *Lambert v. Lambert*, 872 So. 2d 679, 681-82 (Miss. Ct. App. 2003). The chancellor modified primary physical custody to the father, finding the mother's relocation was a material change in circumstances that would adversely affect the child. *Id.* at 682. The chancellor reasoned that the mother's relocation would interfere with the father's visitation and that the prior divorce decree could not be fully enforced. *Id.* The chancellor also found there was an adverse affect on the child because the wife and her therapist testified that the child experienced anxiety. *Id.* This Court reversed and rendered and returned custody to the mother. *Id.* at 686. Even though the father alleged that modification was warranted because the relocation would interfere with his visitation and require that the minor child change schools, this Court found that the father "totally

failed to show any change in circumstances." *Id.* at 685. This Court further found the father had failed to show an adverse affect sufficient to warrant custody modification. *Id.* at 685-86. A mental health therapist testifying for the mother opined that the child's anxiety was a result of the custody litigation and nothing in the mother's home environment was adverse to the child. *Id.* at 686. This Court averred, "The appellate courts have repeatedly held that the mere moving of one party or the other is insufficient grounds for modification of child custody." *Id.* "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." *Id.* at 684 (quoting *Ballard v. Ballard,* 434 So. 2d 1357, 1360 (Miss. 1983)).

In another case, *Staggs v. Staggs*, the parties agreed during their divorce that the mother would have primary physical custody of their three children, and thereafter, the mother relocated to Maryland to be with her new husband. *Staggs v. Staggs*, 919 So. 2d 112, 114 (Miss. Ct. App. 2005). The chancellor found no material change in circumstances that would warrant a change of custody of the parties' ten-year-old son, Kenny, and this Court affirmed. *Id.* at 115, 119, 122. The father introduced evidence that Kenny experienced anxiety and depression as a result of the move, that he was not able to participate in extracurricular activities in Maryland, that he did not want to leave his friends and make new friends in Maryland, and that Kenny expressed a preference to live with his father. *Id.* at 115, 117, 121. The evidence also demonstrated that the mother was a recovering alcoholic and that she slept in the same bed with her husband before they were married while the children were present. *Id.* at 114, 119. However, the mother presented evidence that Kenny was experiencing "typical adjustment reactions to a move," that he had maintained his good grades, and that his behavior had not changed since relocating to

Maryland. *Id.* at 117, 118, 119. This Court concluded, "the record supports a finding that Kenny is currently in a stable, safe, and comfortable environment, that his needs are being met, and that there was no material change of circumstances adverse to Kenny's well-being." *Id.* at 122.

C. *The Chancellor's Errors*

1. *No Material Change in Circumstances*

In the present case, the chancellor found "by clear and convincing evidence that a substantial and material change in circumstances has occurred, to-wit, that the Defendant/Counter-Plaintiff moving to Ocean Springs seeking to take the children with her..." (R. at 123; R.E. 00038.) In so finding, the chancellor erred and improperly applied the long line of cases holding that a custodial parent's relocation is not a material change in circumstances.

In his *Motion for Modification* and at trial, Paul asserted that Liz's relocation and the children's preference to remain with him constituted a material change in circumstances. (R. at 082; Tr. 30-32; R.E. 00017, 00077-00079.) At trial, the parties' older daughter Ruth testified that since the divorce there had been no change in her life, other than her mother's relocation to Ocean Springs. (Tr. 157; R.E. 204.) Ruth averred, "it's been pretty steady these past seven years." (Tr. 157; R.E. 204.) Mary agreed that the only issue was her mother's relocation and that was the only reason for the trial. (Tr. 199-200; R.E. 00246-00247.)

However, under *Pearson*, *Lambert*, *Staggs*, and the long line of cases cited above, Liz's relocation was not a material change in circumstances. Even though the relocation would require that Mary change schools, like in *Lambert* and in every other relocation case, this does not suffice to create a material change in circumstances. While Mary does not want to make new friends and instead prefers to remain with her father in Saltillo, like in *Staggs*, this does not suffice to create a material change in circumstances. Relocation to Ocean Springs will require

sailing for the Fourth of July. (Tr. 166, 180, 181; R.E. 00213, 00227, 00228.) Mary was also excited about how her mother helped her receive lifeguard certification until she learned it was to help her get a job on the Gulf Coast. (Tr. 181, 266; R.E. 00228, 00313.) During Mary's visit, Liz made numerous efforts to ease Mary into the relocation and to help her look forward to moving. For example, Liz introduced her daughter to other girls her age, took her deep sea fishing, took her out to dinner, took her to work with her, and talked about getting Mary a coveted job as a marine research volunteer. (Tr. 180, 181, 265-67; R.E. 00227, 00228, 00312-00314.) However, Mary was resistant to these efforts because she had no intention of moving to Ocean Springs. (Tr. 266; R.E. 00313.) Liz also tried to take Mary to counseling to help her with the transition, but after two sessions, Mary refused to go back. (Tr. 264; R.E. 00311.)

Mary's refusal to make new friends in Ocean Springs and her self-induced unhappiness during her three week stay is akin to *Staggs*, where the minor child did not want to make new friends, was resentful that he couldn't participate in extracurricular activities after relocating, and "felt that his mother was 'a little' selfish because of their move." *Staggs*, 919 So. 2d at 117, 121. However, like in *Staggs*, there is no evidence that Mary's reaction was anything other than "typical adjustment reactions to a move," and therefore Paul failed to demonstrate adverse affect so as to warrant a modification of custody.

At trial, Ruth did express some concern about how the relocation would affect Mary's emotional stability, how she would do at a new school, and that she might "lose herself." (Tr. 94; R.E. 00141.) However, Paul admitted at trial that Liz's relocation has not affected Mary at all, because she never actually moved to Ocean Springs. (Tr. 57-58; R.E. 00104-00105.) As in *Pearson*, *Lambert*, and *Staggs*, inference and speculation as to some negative affect, without a showing that Liz's behavior or home environment "clearly posits or causes danger to the mental

and emotional well-being of a child," does not satisfy the necessary requirement of adverse affect. *Lambert*, 872 So. 2d at 684. Therefore, the chancellor erred in finding that Paul had met his burden of proving adverse affect such that modification of custody was warranted.

3. *Directed Verdict and Motion to Dismiss*

At the close of Paul's case in chief, Liz moved for a directed verdict or a judgment of dismissal in her favor based on Paul's failure to meet his burden of proving a material change in circumstances adverse to the best interest of the children. (Tr. 203-05; R.E. 00250-00252.) The chancellor took the motion under advisement, and Liz renewed her motion to dismiss after both parties had rested. (Tr. 207, 348; R.E. 00254, 00395.) The chancellor ultimately dismissed Liz's motion to dismiss. (Tr. 348; R.E. 00395.) In light of the long line of cases cited above in Part II.B., which demonstrate that the relocation of a custodial parent is not a material change in circumstances, and because of Paul's failure to meet his burden of proving a material change in circumstances adverse to the best interest of the children, the chancellor erred in refusing to grant Liz's motion for a directed verdict or 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.

After summarily concluding that Liz's relocation constituted a substantial and material change in circumstances that adversely affected the children, the chancellor conducted an analysis under *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). (R. at 123-127; R.E. 00038-00042.) After affirmatively finding that five of the *Albright* factors favored Paul, the chancellor modified custody and awarded Paul physical custody of minor children. (R. at 123-127; R.E. 00038-00042.) The chancellor erred and/or abused his discretion in his *Albright* analysis.

An appellate court is obligated to find error "if a chancellor improperly considers and

applies the *Albright* factors." *Ellis v. Ellis*, 952 So. 2d 982, 994 (Miss. Ct. App. 2006) (citing *Hollon v. Hollon*, 784 So. 2d 943, 946 (Miss. 2001)). "To determine if a chancellor abused his discretion in such a way, this Court must review each factor along with the evidence and testimony presented at trial pertaining to each factor." *Id.* (citing *Hollon*, 784 So.2d at 947).

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

In his findings of fact, the chancellor determined the children's age favors neither parent as Ruth is eighteen and that Mary is fifteen. (Tr. 350, R. at 123; R.E. 00038, 00397.)

However, the chancellor wholly failed to consider the sex of the children, which clearly favors their mother. *See Watts v. Watts*, 854 So.2d 11, 13 (Miss. Ct. App. 2003) (sex of two daughters favored the mother). Liz is a better custodian of two teenage girls because of the importance of female guidance at that age. *Id.* (father admitted that the mother "would be better equipped to handle certain issues as the girls matured"); *see also Messer v. Messer*, 850 So. 2d 161,167 (Miss. Ct. App. 2003), *motion granted*, 2001-CA-01761 (Miss. Ct. App. 2003) (ten-year-old boy's age and sex favored his father because of the importance of male guidance at that age); *Hassett v. Hassett*, 690 So. 2d 1140, 1149 (Miss. 1997) (father strongly favored because six-year-old boy "was entering an age when male guidance is needed"). 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 this information with her father. (Tr. 135, 136, 151; R.E. 00182, 00183, 00198.) Liz averred at trial that Ruth knows she can always confide in her mother and that there are certain things that teenage girls need to talk to their mother about. (Tr. 267-68; R.E. 00314-00315.)

Mary and Ruth, as teenage girls, clearly need their mother's guidance. Therefore, the age and sex of the children strongly favors Liz. The chancellor abused his discretion in summarily

finding that the children's ages favored neither parent.

2. *Continuity of Care*

With regard to continuity of care, the chancellor found:

> Continuity of care. The child custody agreement provided for specific standard visitation rights of the Plaintiff/Counter-Defendant with the children as a minimum, and other visitation as the parties may agree upon between themselves shall be liberally allowed.
>
> The Defendant/Counter-Plaintiff testified that the children stayed an equal amount of time with the parties. She said 50/50. The Plaintiff/Counter-Defendant and the children testified the children stayed about 65 percent of the time with the Plaintiff/Counter-Defendant.
>
> The immediate family members of both of the parties live within the Lee County, Mississippi, area.
>
> As a finding of fact, based on credibility and weight of evidence, the Court finds that the children stayed with the Plaintiff/Counter-Defendant about 65 percent of the time since the divorce.
>
> That this factor strongly favors the Plaintiff- Counter-Defendant.

(R. at 123-24; R.E. 00038-00039.) The chancellor abused his discretion in finding that continuity of care strongly favors Paul.

In *J.P.M. v. T.D.M.*, the chancellor found that continuity of care favored neither parent when the mother was the primary caregiver for three years, the parties shared custody on a rotating two week basis for seven months, and then the father had temporary custody. *J.P.M. v. T.D.M.*, 932 So. 2d 760, 772 (Miss. 2006). The Mississippi Supreme Court found that the chancellor did not abuse his discretion because "it was reasonable for the chancellor to determine that because there was a distinct period when each parent was the primary care giver and there was a time when both parties equally shared parenting responsibilities, neither party should be favored under this factor." *Id.* The Supreme Court rejected the mother's argument that continuity of care should weigh in her favor because the child was in her custody for a longer period of time if one were to calculate the total time spend with each parent. *Id.* Similarly, in *Turner*, the minor

child spent eight days with his mother and six days with his father during each fourteen day period during the parties' separation. *Turner v. Turner*, 824 So. 2d 652, 656 (Miss. Ct. App. 2002). This Court found "[n]either parent could be designed the primary caregiver during the period of separation." *Id.*

In the present case, the parties' divorce agreement awarded Liz primary physical custody of the minor children with scheduled visitation for Paul. (R. at 019; R.E. 00005.) At trial, Liz testified that the parties deviated from this arrangement shortly after the divorce, and thereafter, the children spent one week with Liz and then one week with Paul. (Tr. 269; R.E. 00316.) Liz testified that the children were with each parent 50 percent of the time; whereas, Paul and the children disagreed. (Tr. 270.) Paul said the children stayed with him 60 to 65 percent of the time. (Tr. 36; R.E. 00083.) Mary said she was with her father about 65 percent of the time. (Tr. 179; R.E. 00226.) Ruth said only that since the divorce, she has primarily lived with her father. (Tr. 92-93; R.E. 00139-00140.)

None of the parties agreed as to how much time the children spent with each parent. The 60 to 65 percent figure picked by Paul is an arbitrary number with no evidentiary support. Just like in *Turner* where the child spent 57% of the time with his mother, even assuming that the children spent slightly more time with Paul, neither parent can be designated as primary caregiver. As in *J.P.M.*, neither party should be favored under continuity of care, and the chancellor should not simply total up the time spent with each parent. Because of the conflicting testimony and because the children spent, at most, slightly more time with Paul, the chancellor abused his discretion in finding that continuity of care strongly favored Paul.

3. *Parenting Skills*

As part of his *Albright* analysis, the chancellor found:

> Best parenting skills. 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 they are not married to, or were then married to, in the presence or whereabouts of the children, but that the Plaintiff/Counter-Defendant clearly has a better ongoing relationship with the children. This was caused in part by the Defendant/Counter-Plaintiff's job duties.
>
> This factor favors the Plaintiff-Counter-Defendant.

(R. at 124; R.E. 00039.) Liz does not challenge the chancellor's determination that both parties have moral deficiencies and exercised poor judgment with alcohol and persons of the opposite sex; however, the chancellor abused his discretion in finding that this factor favored Paul. The evidence demonstrates that Liz is the parent with the better parenting skills.

Paul testified that he has taken the children to their doctor's appointments, fed them, and helped them with their homework, and makes sure Mary has her clothes ready for school each night. (Tr. 37-38, 41; R.E. 00084-00085, 00088.) Similarly, Liz testified that she helped Mary with her homework, planned the children's birthday parties, made the children's doctor's appointments, and that whoever was with the children would take them to their appointments. (Tr. 286, 292; R.E. 00333, 00339.) Paul also testified that he has attended many of Mary's games when she was a cheerleader and a Diamond Girl and that he attended parent-teacher meetings at the children's school. (Tr. 38-39; R.E. 00085-00086.) Liz testified that she attended the mothers' meetings for Mary's cheerleading or had someone attend for her and take notes if she was out of town, and that either she or Ruth would take Mary to her cheerleading practice. (Tr. 293; R.E. 00340.) Liz further testified that she went to Mary's ballgames, helped sell T-shirts, and helped with fund-raising. (Tr. 293; R.E. 00340.) Liz also arranged for Ruth to have private singing lessons and guitar lessons, and Liz attended almost of all of her choir concerts. (Tr. 293-94; R.E. 00340-00341.) Ruth testified that both of her parents were equally involved in her and Mary's extracurricular activities. (Tr. 137, 156; R.E. 00184, 00203.) Ruth also admitted

that both parents missed events because of work. (Tr. 98, 156; R.E. 00145, 00203.) Paul testified that both he and Liz took the children to church at the Orchard. (Tr. 37; R.E. 00084.) However, Liz testified that she was the one who started taking them to the Orchard. (Tr. 291; R.E. 00338.)

While both parents were actively involved in the children's lives, Liz is the one who has been primarily responsible for providing for the children's health needs. (Tr. 284; R.E. 00331.) For example, when Paul lost his job, he would not cooperate with Liz in order to get health insurance for the children. (Tr. 284-85; R.E. 00331-00332.) Liz ultimately had to make the payments so that the children could stay on Paul's insurance, before she switched them over to her insurance. (Tr. 285; R.E. 00332.) Paul refused to reimburse Liz for these expenses even though the parties' divorce agreement provided that Paul would maintain health and dental insurance coverage on the minor children. (Tr. 285; R. at 021; R.E. 00007, 00332.) In the *Agreed Order* of July 29,2008, the chancellor found that Paul had failed to provide health insurance for the children and ordered Paul to reimburse Liz for the cost that she incurred each month to maintain insurance coverage for the children. (R. at 064, 066; R.E. 00011, 00013.)

As a part of the chancellor's *Albright* analysis, Liz's attention to the children's health needs should have weighed in her favor. *See McCullough v. McCullough*, 2008-CA-00029-COA (¶ 37-38) (Miss. Ct. App. 2009) (parenting skills favored father who was "more attentive to the children's medical needs"). For example, in *Hoggatt v. Hoggatt*, custody was modified from the mother to the father when there was "an apparent persistent disregard by the mother for the child's personal hygiene...and a blatant lack of concern over the child's medical well-being as evidenced by the mother's failure to act on the child's severe dental problems." *Hoggatt v. Hoggatt*, 796 So. 2d 273, 274 (Miss. Ct. App. 2001). Similarly, in *Stark v. Anderson*, custody was modified from the mother to the father when the record reflected that the father and his new

wife were attentive to the child's medical and dental care, whereas the mother was not. *Stark v. Anderson*, 748 So. 2d 838, 843 (Miss. Ct. App. 1999). In the present case, the chancellor abused his discretion in failing to consider Paul's failure to provide for the children's health needs, and the chancellor further erred in failing to favor Liz for her attention to the children's health needs.

The chancellor also abused his discretion in failing to favor Liz for her superior parenting skills in disciplining and caring for the children. It is clear from the record that the parties' children, especially the younger daughter Mary, are in need of supervision. For example, both Liz and Ruth expressed concerns about Mary's friend Noel. (Tr. 194, 115-16, R.E. 00241, 00162-00163.) Noel has a bad reputation in the community and is rumored to have had sexual relations with a much older man. (Tr. 194-95, 116-17; R.E. 00241-00242, 00163-00164.) Noel's older brother had been arrested for armed robbery and drugs charges. (Tr. 117, 194; R.E. 00164, 00241.) Ruth also testified that on one occasion Mary lied and covered for a friend when she had either snuck out with a boy or gone somewhere with people when her parents would not have approved. (Tr. 127; R.E. 00174.) Patricia Stogner, who has lived across the street from Paul since 1995 when Paul and Liz were still married, testified that the children needed supervision and that in the past, Mary has used heavy makeup and worn revealing clothes. (Tr. 222-23, 253; R.E. 00269-00270, 00300.)

Liz has acted properly in responding to her daughter's need for guidance, stability, and discipline. For example, Liz does not allow Mary to go to her friend Noel's house. (Tr. 195, 262; R.E. 00242, 00309.) Liz has told her daughter Mary that her revealing clothing, heavy makeup, and body piercings are not appropriate. (Tr. 112-13,190-91, 261; R.E. 00159-00160, 00237-00238, 00308.) Liz has also exercised proper care to ensure Mary's physical well-being and safety. For example, Liz chastised Mary for burning herself with bottle caps with her friends.

(Tr. 114, 192; R.E. 00161, 00239.) Liz also stays informed about who her children are associating with, and she is very strict about getting the cell phone numbers and home telephone numbers of Mary's friends when they go out. (Tr. 199, 262; R.E. 00246, 00309.)

Paul, on the other hand, has not properly supervised or disciplined the children. For example, Liz disagrees with Paul allowing Mary to go over to her friend Noel's house. (Tr. 263; R.E. 00310.) Paul's neighbor Patricia testified she has concerns about Paul's lack of supervision over the children. (Tr. 231; R.E. 00278.) Specifically, Patricia is concerned that when the children are with Paul, "they can just go wherever they want to go and do what they want to do, and that's no problem." (Tr. 231; R.E. 00278.) Patricia also recalled an incident from two years ago when the police were called to Paul's home for an alleged burglary. (Tr. 231; R.E. 00278.) The girls came over to Patricia's house in the early morning hours, crying and scared, and said they could not find their father. (Tr. 231-32; R.E. 00278-00279.) Paul couldn't be found until 20 minutes later, and he just laughed off the entire incident. (Tr. 232-33; R.E. 00279-00280.)

Paul has also interfered with Liz's disciplining of the children. (Tr. 260; R.E. 00307.) On one occasion, Liz grounded Ruth for staying out all night without telling Liz where she was. (Tr. 260; R.E. 00307.) Liz then had to go out of town and leave Ruth with Paul. (Tr. 260; R.E. 00307.) Even though Paul knew Ruth was grounded, he let her go over to a friend's house. (Tr. 260; R.E. 00307.) Paul then got mad at Liz when she grounded Ruth for another week. (Tr. 260-61; R.E. 00307-00308.) In another example, Paul's neighbor Patricia testified to an incident where Liz refused to let Mary go out with her friends, and Mary got angry with her mother. (Tr. 225-26; R.E. 00272-00273.) Mary called her father, who immediately called Liz and convinced her to let Mary come over to his house. (Tr. 226; R.E. 00273.) Patricia recalled this happening three times when Mary would get upset with her mother and call her father. (Tr. 226; R.E.

00273.) Patricia testified the children would be better off with Liz. (Tr. 234; R.E. 00281.)

The chancellor found that Paul had a better relationship with the children, which was caused in part by Liz's job duties. First, any such consideration should have been made under the factors of emotional ties or preference of the children. The chancellor improperly considered such allegations under parenting skills, thereby awarding it double weight. Second, Liz admits that she and the children have had disagreements. However, this is due largely to the children's rebelling against Liz's efforts to discipline and supervise them. Paul's neighbor Patricia Stogner testified that Liz had a good relationship with her daughters, and that "[t]here really wasn't any turmoil or anything unless Liz put her foot down and had to say no about something." (Tr. 224; R.E. 00271.) For example, Mary and Ruth became upset with Liz for calling Mary's boyfriend's parents on one occasion after Liz heard that Mary had stayed at their house overnight. (Tr. 119, 196; R.E. 00166; 00243.) However, Mary admitted that Liz was acting like a good parent when she did this. (Tr. 197; 00244.) Liz testified that her older child Ruth has always felt like she had to take care of Mary and that when the children were at Paul's house, Ruth got to "be the mother over there" and have control over Mary. (Tr. 259; R.E. 00306.) As a result, when the children would come back home to Liz, she and Ruth would often disagree. (Tr. 259; R.E. 00306.) Ruth similarly testified that she fought with her mother over her parenting decisions with regard to Mary, and that she argued more with her mother than with her father. (Tr.111; R.E. 00158.)

In evaluating the parties' parenting skills, the chancellor erred by failing to consider Liz's superior disciplinary skills, Paul's lack of supervision and interference with Liz's discipline of the children, and the children's hostility to their mother's efforts to discipline them. For example, in *Collins v. Collins*, this Court found that the chancellor's decision that the mother had the best parenting skills was supported by substantial evidence, including that the father failed to properly

discipline the child and exercised inconsistent discipline. *Collins v. Collins*, 20 So. 3d 683 (Miss. Ct. App. 2008), *rehearing, en banc, denied*, 2007-CA-00717-COA (Miss. Ct. App. 2009), *writ of certiorari denied*, 2007-CT-00717-SCT (Miss. 2009); *see also Hoggatt v. Hoggatt*, 796 So. 2d 273, 274 (Miss. Ct. App. 2001) (custody modification warranted when among other things, the existing arrangement "involved a lack of supervision that caused the child to repeatedly place himself in situations where he could easily have been subjected to substantial physical harm").

Similarly, in *Mosley v. Mosley*, the chancellor awarded custody to the mother after considering the father's lack of supervision over the children. The father left the parties' older daughter at home alone with her younger brother, and she was involved in a car accident while driving her brother to the hospital, without a license. The chancellor further noted that the daughter had to consistently play mother to her younger brother which was very detrimental: "Closeness is one thing but responsibility is another and this little girl has been put in a position where she is the mother of this little boy and that is inappropriate." *Mosley v. Mosley*, 784 So. 2d 901, 907 (Miss. 2001). Paul's lack of supervision, his failure to discipline the children, and his placing Ruth in the position of acting as mother to her younger sister Mary demonstrate a notable lack of parenting skills, which the chancellor abused his discretion in failing to consider.

The chancellor further abused his discretion in not favoring Liz for her superior skills in ensuring that the children are properly supervised and disciplined. *See Moak v. Moak*, 631 So. 2d 196,198 (Miss. 1994) (affirming chancellor's award of physical custody to the mother, "the person to whom the children had always looked for supervision, food, and clothing"); *see also Horn v. Horn*, 909 So. 2d 1151, 1159 (Miss. Ct. App. 2005) (chancellor found that parenting skills favored the mother who did most of the disciplining).

In sum, the chancellor abused his discretion in determining that the parenting skills 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 found: "Both parties have expressed a willingness to provide primary child care for the children. Financially, the Defendant/Counter-Plaintiff has proven a better capacity to provide for the children. Emotionally, the Plaintiff/Counter-Defendant has proven a better capacity to provide for the children. As such, this factor favors neither party." (R. at 124; R.E. 00039.) In light of Paul's failure to financially support the children, the chancellor abused his discretion in failing to weigh this factor in Liz's favor.

In *Jordan v. Jordan*, this Court held that while a parent's greater income does not entitle him to a preference in a custody dispute, the fact that the mother 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 under the willingness and capacity to provide primary child care factor. *Jordan v. Jordan*, 963 So.2d 1235, 1241 (Miss. Ct. App. 2007).

In this case, Paul's failure to pay child support for three years shows his unwillingness and/or incapacity to provide primary child care. (Tr. 306; R.E. 00353.) At the time of trial, Paul had been recently unemployed for a year, and his current construction job was only temporary. (Tr. 273; R.E. 00320.) Paul also had not voluntarily provided financial support for the children for years. (Tr. 319-20; R.E. 00366-00367.) In fact, the only child support Liz received for several years was $817 a month that D.H.S. withheld from Paul's paycheck. (Tr. 319; R.E. 00366.)

On the other hand, Liz and her new husband Lance do have the financial ability to support Mary, and the children have always come to Liz to fulfill their financial needs. (Tr. 267, 274; R.E. 00314, 00321.) At trial, Paul and the children indicated that Liz was the better

financial provider. For example, Ruth testified that her mother gave her money for things more often than her father. (Tr. 138; R.E. 00185.) Paul also testified that Liz had been the one who paid for all of the children's activities "[a]s she should." (Tr. 72; R.E. 00119.)

While the children in this case may relate better to their father, this should be weighed under the emotional ties factor and should not be given additional weight under capacity to provide primary child care. Moreover, even assuming Paul has a better emotional capacity to provide for the children, this does not outweigh Liz's superior capacity to financially support the children as in *Jordan*. Considering this and Paul's failure to financially support the children, the chancellor should have found the factor of willingness and capacity to provide primary child care favored Liz. Therefore, the chancellor abused his discretion in finding this factor favored Paul.

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

The chancellor found:

> Employment and responsibilities of employment of parents. The Defendant/Counter-Plaintiff has had more stable employment than the Plaintiff/Counter-Defendant, but both are gainfully employed. Both parents' jobs have kept them away from the children at different times in different ways, but the Defendant/Counter-Plaintiff's job has done so regularly and frequently for several days at a time when she is gone, when the Plaintiff/Counter-Defendant's job does so for several hours on a daily basis.
>
> This favor favors neither party.

(R. at 124; R.E. 00039.) The chancellor abused his discretion in failing to favor Liz under the employment factor.

In *Watts v. Watts*, this Court found a special judge erred in finding that the employment factor favored the father when he worked long hours, would be unable to pick the children up from school, and would have to pay for child care services or have his mother care for the children until he returned home from work. *Watts v. Watts*, 854 So. 2d 11, 15 (Miss. Ct. App.

2003). The evidence weighed in favor of the mother, whose schedule as a teacher allowed her to pick the children up from school, take them to their extracurricular activities, and spend summers with them. *Id. See also Marter v. Marter*, 914 So. 2d 743, 750 (Miss. Ct. App. 2005) (father favored for his stable employment which allowed greater flexibility over mother who recently changed jobs); *Ivy v. Ivy*, 863 So.2d 1010, 1014 (Miss. Ct. App. 2004) (employment factor favored mother when father "worked extended hours that would prevent him from devoting time to the children"); *Rinehart v. Barnes*, 819 So.2d 564, 566-67 (Miss. Ct. App. 2002) (employment factor favored father whose work schedule was flexible and allowed him to work from home); *Massey v. Huggins*, 799 So. 2d 902, 907 (Miss. Ct. App. 2001) (while both parents worked regular hours, father was favored because his work schedule was flexible and allowed him to be at home with the children during the day, whereas the mother's work schedule was inflexible).

In *Lee v. Lee*, the Mississippi Supreme Court found no error with the chancellor's determination that the father had an advantage in the location, hours, and nature of his work as a real estate broker. *Lee v. Lee*, 798 So. 2d 1284, 1287, 1290 (Miss. 2001). The mother's nursing job was not as flexible as the father's and was over fifty miles from home, which would require that the mother wake the daughter up very early in the morning to put her in daycare. *Id.* at 1290.

In this case, Liz has worked for the past seven years for Rehabilitation, Inc., where her new husband also works. (Tr. 42, 273; R.E. 00089, 00320.) Liz and Lance work from home and also have an office near their Ocean Springs home. (Tr. 270, 273; R.E. 00317, 00320.) Liz's job involves some travel; however, Lance could stay with the children if Liz was out of town, and vice versa. (Tr. 273-74; R.E. 00320-00321.) Liz's job is also very flexible and allows her to leave the office and come home whenever the need arises. (Tr. 273; R.E. 00320.) Liz's work allows her to adjust her schedule so she can be there for her daughter Mary. (Tr. 257; R.E. 00304.)

On the other hand, at the time of trial, Paul had been recently unemployed for a year, and his construction job was only temporary. (Tr. 273; R.E. 00320.) Paul testified that he works approximately 48 to 50 hours a week and occasionally works overtime. (Tr. 59; R.E. 00106.) Paul has to commute approximately an hour and fifteen minutes to work, such that he leaves home at 5:30 a.m. and does not return until 6:30 p.m. (Tr. 41, 60; R.E. 0088, 00107.) Paul further testified he normally works 10 hours a day, five or six days a week. (Tr. 59; R.E. 00106.)

When Paul leaves for work early each morning, he wakes up his daughter Mary, and then leaves her alone for about an hour while she gets herself dressed for school. (Tr. 41, 61-62, 177; R.E. 00088, 00108-00109, 00224.) Ruth previously drove her sister to school, but since Ruth will be away at college, in the future Mary will have to drive herself or have a friend drive her to school. (Tr. 61, 177-78; R.E. 00108, 00224-00225.) In the afternoons, Paul will have to rely on his fiancée, Jenny Young, to care for Mary, which means that Mary will be alone on the days when Jenny has to work. (Tr. 62, 85; R.E. 00109, 00132.) Paul testified that if an emergency arose while he was at work, then his fiancée or another family member would care for Mary. (Tr. 60; R.E. 00107.) While Paul admitted he was very concerned about his daughter slipping off with boys, he testified, "I don't believe that Mary is interested in doing that stuff right at this moment." (Tr. 85-86; R.E. 00132-00133.) Liz, on the other hand, testified that 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 do things for her. (Tr. 286, 272; R.E. 00333, 00319.) Ruth also testified her mother's employment is more flexible than her father's and that her father has missed some her extracurricular activities because of his work. (Tr. 98; R.E. 00145.)

In the present case, the employment factor clearly favors Liz. Under *Watts*, *Marter*, *Rinehart*, and *Massey*, Liz should be favored for her flexible work schedule, which would allow

her to devote additional time to the children. Like in *Watts,* the chancellor should have found that Paul's employment weighs against him because he works long hours, will not be able to take Mary to school or pick her up, and will have to rely on his fiancée to care for his daughter after school or leave her un-chaperoned. Moreover, the stability of Liz's seven year history with her current employer as opposed to Paul's unstable employment history weighs in her favor as in *Marter*. Finally, like in *Rinehart*, *Massey*, and *Lee*, the employment factor clearly favors Liz since Liz can work from home, whereas, Paul has to commute over an hour to work each day, after waking Mary early each morning and leaving her home alone. The chancellor abused his discretion in failing to find that the employment factor favors Liz.

6. *Physical and Mental Health and Age of the Parents*

The chancellor found that this factor favored neither parent since Liz was 48, Paul was 50, and both were in good mental and physical health. (R. at 125; R.E. 00040.) Liz does not challenge the chancellor's findings with regard to this factor.

7. *Emotional Ties of Parent and Child*

The chancellor found, "Clearly, the children are more emotionally tied to the Plaintiff/Counter-Defendant...Both of the children have expressed extremely close emotional ties to each other... This factor favors the Plaintiff/Counter-Defendant, primarily, because of the tie between the children as expressed for their father." (R. at 125; R.E. 00040.) The chancellor abused his discretion in finding this factor favored Paul.

Liz admits that the chancellor was correct in finding that the children are extremely close to one another. However, as Paul admitted at trial, regardless of whether Mary lives in Saltillo with her father or in Ocean Springs with her mother, Mary will necessarily be separated most of the time from her sister Ruth who is attending college in Colombus at the University of Women.

(Tr. 64; R.E. 00111.) Because of this fact and the reasons cited below in Part III.12. regarding the separation of siblings, the close emotional ties of the children favors neither parent.

With regard to the emotional ties between each parent and child, the record reveals that the children are more distant from their father and closer to their mother than the chancellor otherwise found. For example, Paul testified that he and his children "talk about everything," but Paul was surprised to learn that his daughter Ruth had become sexually active. (Tr. 34-35, 69-70; R.E. 00081-00082, 00116-00117.) Ruth shared this information only with her mother because she was not comfortable sharing this information with her father. (Tr. 135-36, 151; R.E. 00182-00183, 00198.) Liz confirmed that when the children are in trouble or hurt, they confide their personal issues to her. (Tr. 267; R.E. 00314.) On the other hand, neither child knew that their father was engaged, and both children discovered this information at trial. (Tr. 99, 186; R.E. 00146, 00233.) Moreover, Mary could not recall where her father worked, and she did not know his work number. (Tr. 176, 178; R.E. 00223, 00225.) The children were clearly more distant from Paul than the chancellor supposed.

The chancellor also failed to consider that children's attitude toward Liz was improperly motivated. For example, Mary testified that she was angry with her mother for "having to be pulled away from everything." (Tr. 184; R.E. 00231.) Liz also testified that the children may have an easier time with Paul because he lets them do what they want. (Tr. 267; R.E. 00314.)

Because the children's relationship with their father was more distant and superficial than the chancellor determined, and based on the children's improper motivations and the reasons cited below in Part III.10. as to why the chancellor should put less weigh on the preference of the children, the chancellor abused his discretion in holding the emotional ties factor favored Paul.

8. *Moral Fitness of the Parents*

The chancellor found this factor favored neither party as both had moral lapses with regard to alcohol and romantic partners. (R. at 125; R.E. 00040.) Liz does not challenge the chancellor's findings with regard to this factor.

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

The chancellor found:

> The children have been very active in the affairs of their school at Saltillo, in work in Saltillo and are recognized by their peers and the parties for such. Their ties are in the community of Saltillo, which the Defendant/Counter-Plaintiff is voluntarily leaving so that her current husband can be near his child.
>
> This factor strongly favors the Plaintiff/Counter-Defendant who intends to continue to reside in Saltillo.

(R. at 126; R.E. 00041.) The chancellor erred in finding that this factor favored Paul.

Prior to Liz's relocation, Paul and Liz were both actively involved in their children's extracurricular activities in Saltillo. *See* discussion, *supra* Part III.3. When Liz decided to relocate, she encouraged Mary to become involved in activities in Ocean Springs, including an art class and marine research volunteer work. (Tr. 267, 305; R.E. 00314, 00352.) The chancellor abused his discretion in failing to consider those facts. *See Steverson v. Steverson*, 846 So. 2d 304, 306 (Miss. Ct. App. 2003) (home, school, and community record factor favored father who was involved in children's extracurricular activities and sports).

Prior to Liz's relocation, both children did well academically in Saltillo. (Tr. 48, 92, 166, 303; R.E. 00095, 00139, 00213, 00350). However, this was at a time when the children were in the care of both parents. Both parents testified they helped with homework. (Tr. 38, 292; R.E. 00085, 00339). Because nothing in the record indicates Mary would do poorly in Ocean Spring or that she would continue to do well in Saltillo without her mother, the chancellor abused his discretion in finding that the home, school and community record of the child factor strongly

favored Paul. *See Ellis v. Ellis*, 952 So. 2d 982, 996-997 (Miss. Ct. App. 2006), *as corrected*, (Miss. Ct. App. 2007) (home, school, and community record favored neither party when evidence showed the child could function equally well academically in Oklahoma or Mississippi); *Romans v. Fulgham*, 939 So. 2d 849, 854 (Miss. Ct. App. 2006) (en banc) (home, school and community record factor favored father when child struggled academically while in her mother's care but improved with father's help).

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

The chancellor found that the children prefer to remain with their father and to maintain a close relationship with each other, such that this factor strongly favors Paul. (R. at 126; R.E. 00041.) The chancellor abused his discretion in so finding.

As stated above and addressed further below in Part III.12., regardless of where Mary lives, she will no longer have daily contact with her sister Ruth who will be away at college. Therefore, this fact favors neither parent.

Even though the children expressed a preference to remain in Saltillo with their father, the record reveals that the children's preference is improperly motivated and should not have been afforded such strong weight by the chancellor. For example, in *Ferguson v. Ferguson*, the parties' fourteen-year-old son, Bubba, testified that he preferred to live with his father, and the father alleged that the mother-son relationship had deteriorated and that the mother yelled at her son and made derogatory comments. *Ferguson v. Ferguson,* 639 So. 2d 921, 931-32 (Miss. 1994). The Mississippi Supreme Court affirmed the chancellor's award of permanent custody to the mother when the record revealed that the boy's relationship "would seriously deteriorate if he were allowed to live with his father" and that the father had:

(1) encouraged the child to ignore and disobey his mother; (2) allowed the

> impressionable fourteen year old to chew tobacco and dip snuff; (3) allowed the child to ride a four-wheeler without adult supervision; (4) purchased for his minor son, and allowed him to carry and shoot, unsupervised by an adult, a .357 magnum pistol; (5) kept his supply of pornographic movies in the child's bedroom; (6) told Bubba that he would buy Bubba a truck if Bubba stayed with him after the divorce; (7) belittled his wife in the boy's presence and encouraged his son to do the same.

Id. at 932.

In the present case, Mary testified that she wanted to remain in Saltillo where her family and friends were located. (Tr. 182, 303; R.E. 00229, 00350.) Mary told her mother prior to trial that if Paul moved, she would stay with her friends' mothers so that she could remain in Saltillo and graduate from Saltillo High School. (Tr. 287-88; R.E. 00334-00335.) Mary also stated prior to trial that she would want to stay with her mother if her father was the one moving, but she testified otherwise at trial. (Tr. 183; R.E. 00230.)

Mary had also told Liz's neighbor, Susan Morris, that she felt like she had to stay in Saltillo and take care of her father. (Tr. 213, 219; R.E. 00260, 00266.) Paul's neighbor, Patricia Stogner, confirmed that Paul made Mary feel like she had to take care of him and made her feel guilty for leaving him. (Tr. 234; R.E. 00281.) Liz similarly testified that Paul made the children feel like he was doing nothing, waiting on them to return to his house for his periods of visitation. (Tr. 270; R.E. 00317.) Thus, Mary's desire to remain with her father is a result of her desire to remain in Saltillo and her feelings of guilt over the idea of leaving her father.

Regarding the oldest child Ruth, she testified she wanted to live in Saltillo because her mother lived four hours away from where she would attend college. (Tr. 93; R.E. 00140.) Ruth also testified her family and friends were in Saltillo and that she planned to work in Saltillo on the weekends. (Tr. 93; R.E. 00140.) However, Liz testified Ruth initially supported Mary moving to the Coast and that Ruth had considered attending college there. (Tr. 294-95; R.E. 00341-

00342.) However, Ruth changed her mind and decided she wanted to stay in Saltillo when she found a boyfriend there. (Tr. 294; R.E. 00341.) Ruth then decided she wanted Mary to stay in Saltillo so that Ruth could conveniently visit with her on the weekends. (Tr. 294; R.E. 00341.)

Moreover, Ruth testified she has argued with her mother over Mary's custody and that she is angry at her mother. (Tr. 129-30; R.E. 00176-00177.) Liz testified, "I think that if I lose custody of [Mary], it's going to take years, if ever, to repair what's gone on here. If I do get custody of her, I think it's going to be tough for a while, but I love her and love her unconditionally." (Tr. 288; R.E. 00335.)

The children's preference is to remain with their father. However, this preference is 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 that is convenient for her. Finally, the children's preference to remain with Paul is highly influenced by Paul's lax attitude toward disciplining and supervising as opposed to Liz's stricter methods, which demonstrate her superior parenting skills at stated above in Part III.3. Like in *Ferguson*, the children's improper motivations clearly show that the chancellor should not have afforded their preference such weight in his *Albright* analysis. Also like in *Ferguson*, Liz testified that her relationship with Mary would be worse and more difficult to repair if Paul was awarded custody. Thus, the chancellor abused his discretion in finding this factor strongly favored Paul.

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

The chancellor found that this factor favors Liz. (R. at 126; R.E. 00041.) Liz does not challenge the chancellor's findings with regard to this factor.

12. *Other Factors*

In his oral opinion at the end of trial, the chancellor found:

> Other factors. The defendant/counter plaintiff's choice to be near where her current husband lives when neither of their employment requires it constitutes a telling choice, if not an abandonment, by the defendant/counter plaintiff, and I'm not saying she has abandoned her children, I want to make that clear, ma'am, but I think it's a choice that was not necessary to be made under the circumstances.[6]

(Tr. 355-56; R.E. 00402-00403.) Under other factors, the chancellor also found:

> The desire of the children not to be separated and kept as close as possible is another factor.
>
> Further, the Defendant/Counter-Plaintiff'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.

(R. at 126; Tr. 356; R.E. 00041, 00403.) While the chancellor did not state what weight he gave to these other factors or which parent they favored, every indication is that they weighed against Liz. That was an abuse of the chancellor's discretion.

First, the chancellor abused his discretion by weighing against Liz the fact that her relocation was voluntary. In *Bell v. Bell*, the Mississippi Supreme Court held that courts cannot order and parties cannot agree that a child be reared in a fixed community until majority, stating:

> we put our heads in the sand when we ignore that ours is an increasingly mobile society and that opportunities for social, economic, professional and educational advancement frequently dictate to reasonable persons that they move from one community to another and often from one 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 v. Bell, 572 So. 2d 841, 845 (Miss. 1990), *as modified*, 89-CA-1108 (Miss. 1990). The Court further espoused: "We regard it presumptuous for anyone, court or otherwise, to declare as

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[6]Noteworthy is the fact that the chancellor's written *Order* states only, "Other Factors. The Defendant/Counter-Plaintiff's choice to be near where her current husband lives when neither of their employment requires it constitutes a choice that was not necessary to be made under the circumstances." (R. at 126; R.E. 00041)

an absolute that it is in the best interest of a young boy or girl that he or she spend his or her entire minority in a single community." *Id.* "It is an incident of custody that the parent having physical custody provide a residence for the child where he or she thinks appropriate. The location of this residence is a matter committed to the discretion of the custodial parent in the first instance." *Id.* at 847.

In the present case, Liz chose to relocate to Ocean Springs, where her new husband lived and near where their mutual employer had an office located. (Tr. 301; R.E. 00348.) Liz admitted that her relocation was not required; however it was clearly motivated by social and professional concerns. (Tr. 301-02; R.E. 00348-00349.) As the Supreme Court stated in *Bell*, Liz had a federal right to relocate, and she had a further right, as the custodial parent, to relocate to an area of her choosing. The chancellor abused his discretion in disfavoring Liz based on his finding that Liz's relocation was not mandatory.

Moreover, contrary to the chancellor's accusation, Liz did not abandon her children by moving to Ocean Springs. Liz fought throughout the trial for the right to take her children with her.

With regard to the issue of separation of siblings, the *Bell* Court affirmed the chancellor's decision that the custodial mother be allowed to relocate with her younger son, while modifying custody of the parties' older son to his father. *Bell v. Bell*, 572 So. 2d 841, 846 (Miss. 1990), *as modified*, 89-CA-1108 (Miss. 1990). Despite our state's policy of discouraging separation of siblings, the Court was mindful of the fact that the visitation schedule assured that the two children "are together as much as is reasonably practicable given their residence in separate communities and their attendance at difference school." *Id.*

In *Delozier v. Delozier*, this Court affirmed a chancellor's award of joint physical custody

of the parties' minor child, whereby the mother would have the child each weekend and the father would have the child each week during the school year. *Delozier v. Delozier*, 724 So. 2d 984, 986-87 (Miss. Ct. App. 1998). Even though the mother argued that this arrangement would often separate the child from his half-brother who lived with her, this Court found there was no alterative considering that the father worked Thursday evening until Sunday and because the mother's relocation meant that the parties' lived four hours apart. *Id.* at 986. This Court held: "While we recognize that courts should attempt to keep siblings together when possible, 'there is no per se rule against the separation of children.'" *Id.* (citing *Bowen v. Bowen*, 688 So. 2d 1374, 1380 (Miss. 1997)). Finally, in *Mosley v. Mosley*, the mother was awarded custody of the parties' two children at the time of their divorce, and thereafter the father petitioned for a modification of custody. *Mosley v. Mosley*, 819 So. 2d 1268, 1268-69 (Miss. 2002). The parties' eighteen-year-old daughter, a student at Meridian Community College, had refused to leave Meridian to live with her mother, who had changed addresses three times since the divorce. *Id.* at 1270. The Mississippi Supreme Court awarded custody of the daughter to the father but affirmed the chancellor's decision to leave custody of the parties' son with the mother based on her finding that the father failed to prove a material and substantial change in circumstances surrounding his custody. *Id.* at 1271, 1273.

In the present case, Paul testified Ruth would be attending the University of Women, but that she would be returning every weekend to his house, which was only an hour away. (Tr. 32; R.E. 00079.) However, Paul admitted that regardless of who has custody, the children would be separated the majority of the time because Ruth would be attending college. (Tr. 64; R.E. 00111.)

As in *Mosely*, custody of Ruth was not really an issue because she was starting college and testified that she planned to come and go as she pleased. (Tr. 256; R.E. 00303.) Admittedly,

Ruth could more conveniently and more frequently visit with Mary if Mary lived only an hour away in Saltillo, as opposed to three and a half hours away in Ocean Springs. (Tr. 300-01; R.E. 00347-00348.) However, like in *Mosley*, Paul has failed to prove a material and substantial change in circumstances surrounding Mary's custody. As announced in *Delzier*, there is no per se rule against separation of siblings, and in this case, there is also no alternative considering Ruth will be away at college. There is also no reasonable way to minimize the separation of the siblings in this case because allowing Mary to live in Saltillo so that Ruth can more conveniently visit with her on the weekends means Mary will never get to see her mother. (Tr. 300-01; R.E. 00347-00348.) On the other hand, if Mary were to live in Ocean Springs, then she would be able to see both her mother during the week and her sister on the weekends when she visits her father in Saltillo. As in *Bell*, awarding custody to Liz would ensure the children are together as much as reasonably practicable considering that Ruth will be away at college and living in another city.

In sum, Ruth's attending college necessarily means that she will be separated from her sister Mary. As in *Mosley*, *Delzier*, and *Bell*, separation of the children was justified and ultimately inevitable in this case. Therefore, the chancellor abused his discretion in finding the children's desire not to be separated was a factor, and further erred in assuming this factor disfavored Liz.

Finally, with regard to the issue of credibility of the witnesses, in the above cited case of *Mosley v. Mosley*, the chancellor found the mother committed perjury by lying to the court about her adulterous relationship and her pregnancy during the divorce hearing, found her in contempt, and ordered her incarcerated based on her failure to comply with UCCR 8.06 regarding notice of change in address. *Mosley*, 819 So. 2d at 1271. The father appealed and requested the mother's testimony be stricken from the record and that the chancellor's award of custody be reversed and

rendered based on the mother's perjury. *Id.* at 1272. The Supreme Court stated, "The chancellor, as the fact-finder in a domestic relations case, must decide who is telling the truth and what weight to give to the testimony of someone who admits lying." *Id.* at 1273. Nevertheless, the Court declined to grant the father's request and affirmed the chancellor's decision. *Id.*

In another case, *Hollon*, the chancellor awarded custody to the father, based largely on his finding that the moral fitness factor weighed in favor of the father because of allegations of the mother's homosexual affair and because the chancellor found her testimony on this issue to be untrustworthy. *Hollon v. Hollon*, 784 So. 2d 943, 944, 949 (Miss. 2001). However, the mother was never found to be unfit, and there was no evidence of detrimental effects suffered by the child as a result of living with his mother. *Id.* at 950. The Mississippi Supreme Court found: "While [the moral fitness] factor is as important as any other and should be given its due consideration, it appears that the allegations offered under this heading were far and away the most scrutinized among the evidence reviewed at trial." *Id.* Therefore, the Court held that the chancellor abused his discretion by placing too much weight upon the moral fitness factor and ignoring evidence under the other factors which favored the mother. *Id.* at 952-53.

As noted in *Mosley*, the chancellor below had a right to weigh the credibility of witnesses, as well as to factor this into his *Albright* analysis by determining what testimony was credible and to further find a witness has committed perjury. However, the chancellor did not find that Liz committed perjury, but merely questioned her credibility. As in *Mosley*, doubts about a party's credibility does not mean she automatically loses custody. Neither is doubtful credibility an independent *Albright* factor. As in *Hollon*, the chancellor here placed too much weight on Liz's moral fitness and her credibility as a witness. The chancellor abused his discretion in finding Liz's credibility was an independent factor and in indicating this weighed against her.

Overall, the chancellor determined that five factors favored neither party, five factors favored Paul, and one factor favored Liz. The chancellor also indicated that three "other factors" weighed against Liz. At the conclusion of his *Albright* analysis, the chancellor granted physical custody of the children to Paul. (Tr. 127; R.E. 00174.) Liz does not challenge the chancellor's findings with regard to three of the *Albright* factors: physical and mental health and age of the parents; moral fitness of the parents; and stability of the home environment and employment. However, Liz argues that the chancellor abused in discretion in his analysis of the remaining *Albright* factors. As a result, the chancellor abused his discretion in shifting physical custody from Liz to Paul. The chancellor erred in failing to find that it was in the best interest of the children 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.

After shifting physical custody of the two minor children to Paul, the chancellor ordered:

> That child support should be and is hereinafter set to be paid by the Defendant/Counter-Plaintiff at 20 percent of the Defendant/Counter-Plaintiff'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 Defendant/counter-Plaintiff's first pay period, which according to her records is August 15, 2009. The child support compilation does not take into consideration whether some deductions such as STD and her 401(k) are mandatory. If it is later shown or agreed that the STD and her 401(k) are mandatory, the child support will be readjusted.

(R. at 127; R.E. 00042.). In awarding this amount of child support, the chancellor erred in failing to make written findings as to the reasonableness of applying the statutory child support guidelines and in failing to consider facts in the record which indicate that a lower amount of child support was more appropriate in this case.

An award of child support is within the discretion of the chancellor and will not be

reversed unless the chancellor was manifestly wrong or manifestly abused his discretion. *Gillespie v. Gillespie*, 594 So. 2d 620, 622 (Miss. 1992). According to the statutory child support guidelines in Mississippi, there is a rebuttable presumption that the appropriate about of child support for two children is 20% of the non-custodial parent's adjusted gross income. *See* MISS. CODE ANN. § 43-19-101(1). However, the Mississippi Supreme Court has stated that "the guidelines do not control per se the amount of an award of child support." *Clausel v. Clausel*, 714 So. 2d 265, 267 (Miss. 1998). For example, MISS. CODE ANN. § 43-19-103 states several criteria that may be used to overcome the rebuttable presumption as to the appropriateness of applying the child support guidelines. Those criteria include:

> (a) Extraordinary medical, psychological, educational or dental expenses.
> (b) Independent income of the child.
> ...
> (e) The age of the child, taking into account the greater needs of older children.
> ...
> (g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent...
> ...
> (i)Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

MISS. CODE ANN. § 43-19-103. Moreover, according to statute:

> In cases in which the adjusted gross income as defined in this section is more than Fifty Thousand Dollars ($ 50,000.00) or less than Five Thousand Dollars ($ 5,000.00), *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) (emphasis added).

In many such cases when the non-custodial parent's adjusted gross income exceeded $50,000, Mississippi courts have ordered that parent to pay less than the percentage recommended under the statutory guidelines. *See Morris v. Morris*, 5 So. 3d 476, 495-496

(Miss. Ct. App. 2008) (father ordered to pay 14.5% of his adjusted gross income of $82,800 for his two children); *Lauro v. Lauro*, 924 So. 2d 584, 589 (Miss. Ct. App. 2006) (father who earned $200,000 a year ordered to pay $2001 per month in child support for this three children or approximately 12%); *Striebeck v. Striebeck*, 911 So. 2d 628, 636-38 (Miss. Ct. App. 2005) (chancellor made sufficient findings in support of his conclusion that applying the statutory child support guideline to a father whose income exceeded $50,000 but varied yearly would be unreasonable; father ordered to pay approximately 2.55% of his income for his daughter plus one half of her private school expenses for a total of approximately 3.79%); *Staggs v. Staggs*, 919 So. 2d 112, 123 (Miss. Ct. App. 2005) (chancellor found statutory guidelines inapplicable to father with an adjusted gross income of $627,600; child support for three children increased to approximately 4.21% of father's adjusted gross income); *Parker v. Dep't of Human Servs.*, 827 So. 2d 18, 20 (Miss. Ct. App. 2002), *motion granted*, 2000-CA-02034-COA (Miss. Ct. App. 2002) (chancellor made sufficient findings that application of guidelines was unreasonable and ordered father to pay 5.5% of his adjusted gross income of $163,700 for his one child); *Davis v. Davis*, 832 So. 2d 492, 497 (Miss. 2002), *as corrected*, (Miss. 2003) (father ordered to pay approximately 13% of his adjusted gross income of $413,016 for his three children); *Markofski v. Holzhauer*, 799 So. 2d 162, 166 (Miss. Ct. App. 2001) (chancellor did not err in determining that application of the statutory guideline would be unreasonable and ordering father to pay 3.87% of his adjusted gross income of $465,036 for his one child).

In addition, a non-custodial parent's payment of college expenses may justify a child support award below the statutory guidelines. *See Douglas v. Douglas*, 766 So. 2d 68, 71 (Miss. Ct. App. 2000) (upholding provision of divorce agreement reducing child support payments upon each child's entrance into college); *Riddick v. Riddick*, 906 So. 2d 813, 820-21 (Miss. 2004)

(upholding provision in divorce agreement allowing husband to suspend child support while a child is in enrolled in college and not living with the wife, and reducing child support while the children are in college and living with the wife); *Lazarus v. Lazarus*, 841 So. 2d 181, 182, 185 (Miss. Ct. App. 2003) (affirming chancellor's order that father pay all of child's college expenses, but not requiring child support); *Francher v. Pell*, 831 So. 2d 1137, 1140-42 (Miss. 2002) (when father paid 70% of oldest child's undergraduate expenses, plus additional expenses of attendance, the amount of child support as it related to that child was reduced by 70% for ten months of the year when that child was enrolled in college); *Sumrall v. Munguia*, 757 So. 2d 279, 283-84 (Miss. 2000) (affirming chancellor's decision to suspend child support during the six months of the year when the children were away in college when father was responsible children's college education); *Traxler v. Traxler*, 730 So. 2d 1098, 1099-1100 (Miss. 1998) (father ordered to pay 61% of minor child's college expenses and approximately 7% of his adjusted gross income when child resided with his mother for more than any 30 day period).

In the present case, the chancellor erred in two respects. First, the chancellor erred in failing to make the appropriate findings of fact. Based on the chancellor's calculations, Liz's adjusted gross income was $62,946.72 a year. Even though Liz's adjusted gross income exceeded $50,000.00, the chancellor did not make any written findings as to the reasonableness of applying the statutory child support guidelines. In so doing, the chancellor erred by not complying with the requirements of MISS. CODE ANN. § 43-19-101(4). Therefore, this Court should reverse and remand in order for the chancellor to make more specific findings with regard to the reasonableness of applying the child support guidelines in this case. *See Yelverton v. Yelverton*, 961 So. 2d 19, 27 (Miss. 2007), *on remand at, remanded by, decision reached on appeal by* 2008-CA-01852-SCT (Miss. 2010) (when father's adjusted gross income exceeded

$50,000, chancellor's brief statement that "'[t]he Court finds that based on [James]'s income, the needs of the children and their related expenses, the statutory guidelines should not apply'...fell short of subsection (4)'s requirement that '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.'")

Second, assuming *in arguendo* that appropriate findings of fact had been made, the record reveals that the chancellor's award of child support was unreasonable in this case. The parties' *Final Judgment of Divorce* incorporated the following agreement between the parties:

> It is agreed between the parties that if the child desires to further their education by attending a college or post-secondary school, Husband and Wife shall each pay one-half of any and all reasonable tuition and fees incurred on behalf of the minor child subject to any scholarships and/or grants the child may be eligible to receive.

(R. at 022; R.E. 00008.) The parties further agreed "to divide equally the cost of all necessary medical, doctor, prescription medicine, hospital, clinic, eye care, dental care and orthodontic care not covered by insurance." (R. at 021, R.E. 00007.)

In the fall of 2009, Ruth began attending the University for Women. (Tr. 92; R.E. 00139.) As a result, Ruth will be at college during the week and at Paul's house only on the weekends. (Tr. 32; R.E. 00079.) In addition to the college support paid by Liz, Ruth is relying on student loans and two scholarships to fund her college education. (Tr. 92; R.E. 00139). Ruth also earns money working at the Dogwood Pharmacy in Saltillo on the weekends. (Tr. 32; R.E. 00079).

Under the statutory criteria for overcoming the child support presumptions and under Mississippi case law, application of the child support guidelines was not reasonable in this case in light of Liz's obligation to pay fifty percent of Ruth's college tuition and uncovered medical expenses, the fact that Ruth physically resides with Paul only on the weekends, and Ruth's independent income. Thus, the chancellor erred in failing to make written findings as required

by MISS. CODE ANN. § 43-19-101(4) and in ordering an amount of child support that was unreasonable under the circumstances.

CONCLUSION

The litigation in this case would not have occurred but for Liz's relocation to Ocean Springs, Mississippi. As the custodial parent, Liz's relocation was not a sufficient basis for modifying custody to Paul under Mississippi law, and modification of custody was not in the children's best interest. Liz submits the chancellor erred in denying her motion for continuance, in finding Paul had met his burden of proving a material and substantial 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 Chancery Court of Lee County should be reversed and rendered, thereby restoring sole physical custody to the Appellant, Mary Elizabeth Brown Robinson.

Respectfully submitted, this the 3rd day of March, 2010.

MARY ELIZABETH BROWN ROBINSON,
Appellant

By: _____

WILLIAM R. WRIGHT (MS Bar [redacted]
WILLARD BENTON GREGG (MS [redacted]
TRHESA B. PATTERSON (MS Bar [redacted]
AMANDA JANE PROCTOR (MS Bar [redacted]
WRIGHT LAW FIRM, P.A.
1062 Highland Colony Parkway, Suite 250
Ridgeland, Mississippi 39157
Post Office Box 12745
Jackson, Mississippi 39236
Telephone: (601) 366-8090
Facsimile: (601) 366-3080

CERTIFICATE OF SERVICE

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

Stephen T. Bailey, Esq.
Evans & Bailey
P. O. Box 7326
Tupelo, MS 38802-7326
Facsimile (662) 844-8333

Edwin H. Priest, Esq.
Priest & Wise, PLLC
P. O. Box 46
Tupelo, MS 38802-0046
Facsimile: (662) 842-4855

Ms. Pam Dallas, Court Reporter
Post Office Box 7395
Tupelo, MS 38802

Judge John A. Hatcher
Post Office Box 118
Booneville, MS 38829

SO CERTIFIED this the 3rd day of March, 2010.

WILLIAM R. WRIGHT
WILLARD BENTON GREGG
TRHESA B. PATTERSON
AMANDA JANE PROCTOR