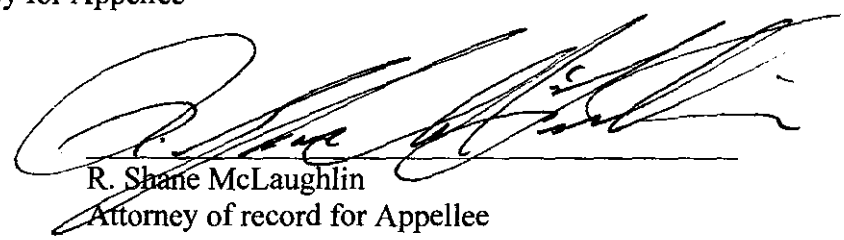
2009-CA-01701 E

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. April M. Watkins, Appellant
2. Jeremy R. Watkins, Appellee
3. Amy D. Saling, attorney for Appellant
4. R. Shane McLaughlin, attorney for Appellee
5. Nicole H. McLaughlin, attorney for Appellee



R. Shane McLaughlin
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STATEMENT REGARDING ORAL ARGUMENT

While Appellee's counsel would welcome the opportunity to present this case orally, Appellee does not believe oral argument would be helpful to the Court in light of the straightforward nature of the issues on appeal. All of the issues raised by Appellant were within the discretion of the Chancellor and are manifestly supported by substantial evidence in the Record. The Record amply supports the Chancellor's factual findings of which Appellant complains.

STATEMENT OF THE ISSUES

1. Whether the Trial Court committed any error by considering April Watkins' physical disability and physical limitations in its *Albright* analysis, where the Chancellor weighed her condition along with the other *Albright* factors.
2. Whether the Trial Court erred in finding that paternal grandfather had not abused the minor child where there was overwhelming evidence in the Record supporting this finding.
3. Whether the Trial Court made an appropriate *Albright* analysis, where the Chancellor discussed each factor in detail in his opinion and his analysis was supported by the evidence produced at trial.

STATEMENT OF THE CASE

April Watkins ("April") filed a Complaint for Divorce against Jeremy Watkins alleging grounds of habitual cruel and inhuman treatment, or alternatively irreconcilable differences, on May 28, 2008. (R. p. 1).[1] Jeremy Watkins ("Jeremy") filed an Answer and Counter-Complaint on June 30, 2008. (R. p. 9).

The Parties agreed on a Temporary Order which was entered on September 11, 2009. (R. p. 41).

The Parties entered into a Consent to Divorce on Grounds of Irreconcilable Differences and agreeing to submit certain issues to the Chancellor on February 20, 2009. A *guardian ad litem* was subsequently appointed. (R. p. 145).

The Trial Court rendered its opinion on August 14, 2009, after approximately five (5) days of trial. (R. p. 181-213). April filed a Motion for a New trial, Reconsideration or Other Relief. (R. p. 215). The Court denied April's post-trial Motion on September 18, 2009. (R. p. 242). April perfected this appeal. (R. p. 249).

[1] Clerk's Papers are cited as "R." and the trial transcript is cited as "T."

STATEMENT OF FACTS

April and Jeremy Watkins were married on October 13, 2001. (R. p. 41). Two children were born to the marriage: Alexander ("Xander") Watkins, a male, was born on May 10, 2002, and Kelsi Watkins, a female, was born on March 13, 2003. (*Id.*).

April has been generally confined to a wheelchair since an automobile accident before the marriage in 1996. (T. p. 20). The accident crushed April's spinal cord, rendered her an incomplete paraplegic and damaged her optic nerve. (T. p. 77). According to April, she is borderline legally blind and is unable to drive a vehicle as a result of her condition. (T. p. 77-78).

During most of the marriage the Watkins and their children lived in Alcorn County, Mississippi. (T. p. 41). The children had friends and an extensive family network in Alcorn County. (T. p. 41). All of Jeremy's immediate family lived nearby. (T. p. 39). Jeremy's parents, Ralph and Darlene Watkins lived about eight miles away from April and Jeremy and frequently provided childcare. (T. p. 466). All of Jeremy's family lived within about twenty minutes of Jeremy and the children. (T. p. 162).

The Watkins' marriage life began to deteriorate because Jeremy's father, Ralph, was accused of having sexually molested Kelsi by April's mother, Laura Michael. (T. p. 620). The allegation against Ralph, whom Kelsi called "Pops" was first made in February 2005, when Kelsi was twenty-three (23) months old. (T. p. 96). Kelsi allegedly made a statement that Pops had touched her when she staying with Laura Michael. (T. p. 300). Laura, who was an over-the-road truck driver, had taken off a few days to take care of April's children. (T. p. 294, 301). Laura testified that while she had the children she laid Kelsi on a bed and told her "this is your pee pee, and no one is supposed to ever touch you down there." (T. p. 301). According to Laura, Kelsi

responded "Pops does" referring to Ralph Watkins. (T. p. 302). Laura told April what Kelsi had allegedly related about Pops. (T. p. 98).

Prior to the allegation being made against Ralph, he and Darlene had the children in their care a significant amount of time. (T. p. 99). After the allegation was made April had a nurse come to her home to examine Kelsi for physical signs of abuse. (T. p. 101). The nurse examined Kelsi and told April that it "it doesn't look like anything happened." (T. p. 101). No report was made to law enforcement, the Department of Human Services, or anyone else as of the February 2005 allegation. (T. p. 137). However, Laura Michael called Ralph and accused him of touching Kelsi. (T. p. 458). Ralph vehemently denied the allegations and explained that "it was like a nightmare." (T. p. 457-58).

Nothing significantly changed with Ralph and Darlene's taking care of the children after the February 2005 allegation. (T. p. 457-58, 486). Ralph and Darlene continued to have the children very frequently. (*Id.*). Ralph and Darlene, or their daughter April Dawn, usually had the children at least three nights a week. (T. p. 457). This continued for years after the allegation that Ralph had molested Kelsi. (*See id.*).

The Watkins' life went on as normal for almost three (3) years, until the issue came up again in December 2007. (T. p. 140). From February 2005 until December 2007, Kelsi never said that "Pops" had touched her. (T. p. 140). However, in December 2007, Kelsi and April had gone again to visit April's mother Laura. (T. p. 532). After the visit with Laura, April decided to question Kelsi about whether Pops had touched her. (T. p. 141). April specifically asked Kelsi whether Pops had been touching her.[2] (*Id.*). At first Kelsi said that Pops had not touched

[2] April explained that she had decided to give Ralph "the benefit of the doubt" for about three (3) years from February 2005 until December 2007. (T. p. 142). She admits she did nothing for about three (3) years after the allegation was first made by her mother and that Ralph and Darlene continued to frequently have the children in

her. (T. p. 102). However, According to April, Kelsi eventually related that Pops had been touching her again. (*Id.*).

This allegation touched off a crisis in the Watkins family. April called the Alcorn County Sheriff's Department to report the allegations this time. (T. p. 143). The Sheriff's Department referred the matter for an investigation by the Department of Human Services. (T. p. 143). Ralph Watkins maintained his innocence, but April cut off all contact between him, Darlene and the grandchildren. (T. p. 147).

Laura Michael was interviewed by the Alcorn County Sheriff's Department as part of the investigation. (T. p. 313). Laura gave inconsistent statements about what Kelsi had related to her regarding the alleged abuse. (T. p. 341). Laura told the investigator that Kelsi had "put her finger in her vagina" in demonstrating that Ralph had penetrated her. (T. p. 314). However, Laura testified contrary to this later. (T. p. 314, 316). Laura claimed that Kelsi did not indicate that Ralph had put his finger in her vagina. (*Id.*). Laura explained that she had made a mistake in giving the statement to the Sheriff's Department investigator "because she was in a hurry" that day. (T. p. 314, 316).

Kelsi was subsequently given a "forensic interview" by Jill Franks of the Department of Human Services Division of Family and Children Services. (T. p. 213). Franks testified that Kelsi said that her Pops had touched her pee pee. (T. p. 224). Kelsi was subsequently given a physical examination at the request of law enforcement. (T. p. 244). The physical examination showed no signs of any abuse. (T. p. 244, 534; Exhibit 12 p. 111).

Ralph Watkins maintained his innocence throughout the investigation. (*See, e.g.,* T. p. 147). Ralph cooperated with police and even took, and passed, a polygraph test. (T. p. 611).

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their care. (*Id.*). However, the allegation from 2005 was "something that stayed on [her] mind a lot" so she finally got around to directly asking Kelsi in December 2007. (*Id.*).

The case was presented to an Alcorn County grand jury which did not return an indictment against Ralph. (T. p. 42). No formal charges were ever brought against Ralph. (*Id.*). The Sheriff's Department and DHS ultimately closed the investigations into the matter. (T. p. 245).

At the trial in this case, Ralph Watkins took the witness stand and testified as follows:

Q: Mr. Watkins, have you ever done any inappropriate touching to Kelsi?

A: No.

Q: Have you ever made any improper moves, or touches, or advances towards Kelsi or any other child?

A: No.

(T. p. 462-63).

Additionally, Ralph's wife Darlene testified that she was frequently around Ralph and the grandchildren. (T. p. 485-89). Darlene testified that Ralph had never done anything remotely inappropriate and was no danger to children. (T. p. 489-91). Similarly, Jeremy's sister, April Rae Watkins testified that she observed Ralph around the children and that Ralph never did anything inappropriate. (T. p. 603). Further, during the DHS investigation, Xander told the social worker that he had never seen Pops touch Kelsi inappropriately. (*See* Ex. 12, p. 99).

No witness testified that Ralph abused Kelsi and there was no credible evidence in this regard produced at trial. Kelsi did not testify in the trial. By the time of trial Kelsi was not making any statements to the effect that Ralph Watkins, or anyone else, had touched her. (T. p. 187). In fact, during the DHS investigation Kelsi recanted her alleged allegation, stating that she was just "tricking" her mother. (*See* Ex. 12, p. 100).

Although Ralph was effectively exonerated from the heinous claims, Laura Michael continued to hurl allegations toward him. Laura penned an inflammatory letter in January 2009, while this case was ongoing, accusing Ralph of sexual abuse and making various derogatory

statements about the Watkins family. (*See* T. p. 345; Ex. 18, p. 120). Further, around this time period Laura called Ralph and told him that he would never see his grandchildren again. (T. p. 346). Jeremy testified that he considered the false allegations, the family upheaval and the things Kelsi had to go through as a result, as detrimental to his children. (T. p. 535).

The allegation of abuse was, by far, the most hotly contested issue at trial. Aside from the abuse allegation it was generally agreed that Jeremy Watkins was a good father. (*See, e.g.,* T. p. 92, 352). Even April and her mother agreed that Jeremy was a good dad. (*Id.*). April testified that her main problem was with Ralph Watkins, and that she did not have any problems with Jeremy as a father. (T. p. 171).

Jeremy had worked for the same company, ThyssenKrupp elevator, for four years and was stable in his job. (T. p. 518). Jeremy loved his children and they loved him. (T. p. 527). Jeremy frequently played with his children and was attentive to them. (*See, e.g.,* T. p. 162, 352). Even Laura Michael testified that Jeremy frequently would "get down in the floor and play with [the children]." (T. p. 352). Jeremy did most of the cooking in the Watkins household before the separation. (T. p. 465). Jeremy transported the children to wherever they needed to go since April could not drive. (T. p. 465). Jeremy did the housework and bathed the children. (T. p. 494). Witnesses testified that Jeremy had good parenting skills. (*See, e.g.,* T. p. 494).

As of trial, Jeremy usually worked about forty (40) hours per week. (T. p. 521). Jeremy did not work overtime hours, though he had worked overtime in the past. (*Id.*). Jeremy usually had to leave for work at about 5:15 a.m. but returned home in the evenings before three o'clock. (T. p. 582). Jeremy would be home from work and able to pick the children up from school everyday. (T. p. 586). Further, Jeremy testified that his family would help him see the children off to school after he left for work, and that he was considering altering his work schedule to

spend even more time with the children. (T. p. 582). Jeremy explained that he was willing and able to take care of the children. (T. p. 527). Jeremy had an extensive family support network in the vicinity. (T. p. 528). Jeremy lives just minutes from many of relatives who were glad to help with childcare if needed. (T. p. 466, 528). Jeremy involved the children in various extra-curricular activities. (T. p. 528). When the children lived in Corinth they were involved in baseball and gymnastics. (T. p. 528).

April was unemployed due to her disability. (T. p. 159-60). April conceded that she had to rely on others for transportation for herself and to take the children anywhere. (T. p. 48, 77). When April lived in Corinth with Jeremy she would often send the children to Jeremy's parents so that they could engage in various activities. (T. p. 162). April's parents, sisters and aunts helped her when she moved out of the marital home to Tennessee. (T. p. 191-93). However, since both of April's parents are over-the-road truck drivers, they are usually gone for a month at a time and are frequently unavailable to assist her. (T. p. 191).

April moved out of the marital home in May 2008. (T. p. 157-58). Before April left the marital home, Kelsi and Xander were very frequently in the care of either Jeremy's parents, Jeremy's sister April Rae or April's grandmother, Wynell Evans. (*See, e.g.,* T. p. 620). April would frequently need a break from the children, and the children would stay with relatives for a while. (T. p. 599). Jeremy's sister, April Rae, explained:

> At least, probably, four nights a week [the children] were either at my house or my parents' house, and if we didn't have Kelsi, that's because she was at her great grandparent's [Wynell Evans] house.

(T. p. 594). April's grandmother, Wynell Evans, testified that she kept Kelsi extensively until Kelsi was about three (3) years old. (T. p. 620). However, Wynell Evans later related to April that she did not believe the allegations April was making about Ralph Watkins. (T. p. 623). In

response, April cut her grandmother out of her life and cut off her contact with her children. (T. p. 623). At trial April admitted that she terminated her relationship, and the children's relationship, with her grandmother because her grandmother doubted the claims of abuse. (T. p. 641). April believed that this conduct was not against the children's best interests. (*Id.*).

April claimed that the reason she left the marital home was because Jeremy did not believe the allegations about his father Ralph. (T. p. 151, 194). April moved the children to a rental apartment in Lawrenceburg, Tennessee. (T. p. 75). April conceded that the children were more accustomed to life in Alcorn County that in Tennessee. (T. p. 162). The children were enrolled in gymnastics and baseball in Mississippi. (T. p. 162-63). Jeremy started a 4-H club in Corinth for the children. (T. p. 583). The children had many friends in Alcorn County. (T. p. 163). The children did fewer activities while they were with April and usually just watched television. (T. p. 587).

As discussed fully below, the evidence in the Record manifestly supports the Chancellor's factual findings in this case. The Chancellor properly weighed the *Albright* factors and concluded that the children's best interests were served by placing physical custody with Jeremy. The Chancellor's decision should be affirmed.

STANDARD OF REVIEW

The scope of review of a Chancellor's custody determination is limited to whether the Chancellor abused his discretion, was manifestly wrong or applied an incorrect legal standard. *Ivy v. Ivy*, 863 So. 2d 1010, 1012 (Miss. Ct. App. 2004). A Chancellor's findings of fact will not be disturbed where they are supported by substantial evidence. *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1991). The Mississippi Court of Appeals has held:

> The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse

> of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.
>
> The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

Carter v. Carter, 735 So. 2d 1109, 1114 (Miss. Ct. App. 1999). That is, the Appellate Court "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000). Rather, the Court has stated "[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor. *Bower*, 758 So. 2d at 412.

In this case, the Chancellor applied the proper legal analysis, his decision as to each *Albright* factor was supported by substantial evidence and the Chancellor in no way abused his discretion. Accordingly, the Court should affirm the Chancellor's custody determination.

SUMMARY OF THE ARGUMENTS

The Chancellor in this case applied each of the applicable *Albright* factors in a thorough and detailed analysis. The Chancellor's *Albright* analysis is manifestly supported by the evidence submitted at trial. The arguments in April's Brief simply take issue with the Chancellor's decisions and his factual findings. However, there can be no serious dispute that the Chancellor's findings are supported by evidence admitted at trial.

First of all, April claims that the Chancellor over-emphasized her disability in the *Albright* analysis. However, April fails to mention that the Chancellor expressly stated that he

was affording this factor the least weight of any *Albright* factor. The Chancellor was required, by *Albright* itself, to at least consider April's physical limitations since they have an effect on her ability to take care of the children and preclude her from driving. However, the Chancellor placed little weight on this factor. The Chancellor's analysis was correct in this regard.

Next, April ostensibly complains that the Chancellor committed clear error when he found that Ralph Watkins had not abused the minor child and that the allegations against him were patently false. April also claims that the Chancellor placed too much reliance on the guardian *ad litem's* report in this regard.

April's arguments are meritless. There was overwhelming evidence at trial that Ralph Watkins had not abused the child. The Chancellor was presented with evidence that medical examinations had revealed no findings indicative of abuse and every allegation of abuse involved instigation or interrogation by April or her mother. Further, there were no allegations between February 2005 and December 2007, when Ralph and his wife Darlene continued to care for the children frequently. Every witness with personal knowledge testified that Ralph had done nothing inappropriate. Ralph, who had cooperated with law enforcement and was never even charged with a crime, vehemently denied any abuse. Both local law enforcement and DHS ultimately closed all investigations into the matter.

There was ample, indeed overwhelming evidence to support the Chancellor's factual findings. Further, the Chancellor specifically stated that since he found that there had been no abuse based on the testimony and evidence at trial, he did not consider the guardian *ad litem's* reports. Accordingly, April's arguments are likewise misplaced in this regard.

Finally, April attacks each of the Chancellor's findings in the *Albright* analysis. Again, April does not, since she cannot, claim there was no evidence to support the findings. She simply disagrees with the findings and asks this Court to find differently.

The Chancellor's decision as to each of the *Albright* factors was supported by substantial evidence. There was no dispute at trial that Jeremy Watkins is a good father who loves his children. Jeremy was willing and able to take care of the children, maintained a stable home, a steady job, had a close network of family to assist with the children as needed and involves the children in various activities where April did not.

The Chancellor correctly applied the *Albright* factors in determining the best interests of the minor child, and properly awarded custody to Jeremy Watkins. April's arguments, at their best, simply dispute the weight the Chancellor afforded to the evidence. The Chancellor's findings are supported by substantial, indeed overwhelming, evidence in the record and are no abuse of discretion. Accordingly, the Chancellor's decision should be affirmed.

ARGUMENT I.

THE CHANCELLOR DID NOT ERR BY AWARDING JEREMY WATKINS CUSTODY OF THE MINOR CHILDREN.

Of course, the polestar consideration in making a custody determination must be the best interest of the child. *Albright v. Albright,* 437 So. 2d 1003, 1005 (Miss. 1983). The Court in *Albright* set out several factors which should be considered in determining the child's best interest. *Albright*, 437 So. 2d at 1005. However, as one commentator has noted "the difficult question of custody between two fit parents can never be reduced to a formula. Each case is different – judges are given great discretion to determine the arrangement that best serves the needs of a particular child." DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 5.02 (1st ed. 2005).

A Chancellor should not place too much emphasis on any one *Albright* factor. *Jones v. Jones*, 19 So. 3d 775, 780 (Miss. Ct. App. 2009); *See also Brekeen v. Brekeen*, 880 So. 2d 280, 287 (Miss. 2004). Rather, the Court should evaluate all of the *Albright* factors as a whole. *Mayfield v. Mayfield*, 956 So. 2d 337, 347 (Miss. Ct. App. 2007).

Contrary to Appellant's arguments, the Chancellor properly evaluated the *Albright* factors and awarded custody to Jeremy. The Chancellor viewed all of the factors, taken as a whole, in making his decision as to the best interests of the children. A summary of the Chancellor's *Albright* analysis is as follows:

1. Age of the children. Xander was a seven (7) year old male, Kelsi was a 6 year old female. The Court found that this factor favored neither party.
2. Health and sex of the children. The Court found that the continued attention, interrogation and endless accusations of sexual abuse involving Kelsi were detrimental to

her best interests. Accordingly, the Court concluded that this factor "slightly favored" Jeremy.

3. Continuity of Care. The Court found that the children were frequently cared for by either their paternal grandparents or maternal grandmother prior to the separation. The Court found that April Watkins had provided primary care since the separation. The Court found that this factor favored neither party.

4. Parenting Skills and Willingness and Capacity to Provide Primary Care. The Court found that April pursuing the sexual abuse allegations against Ralph Watkins exhibited poor parenting skills. The Court also found that April had not allowed the children to participate in extra-curricular activities as Jeremy had. The Court concluded that April kept the children home watching television, instead of engaging in activities, so that she could more easily manage them. Thus, the Court found that this factor favored Jeremy.

5. Employment Responsibilities of Parents. The Court noted that April was not employed and that Jeremy was employed and often worked long hours. However, the Court found that Jeremy testified that he could modify his work hours to spend additional time with the children. The Court found that this factor favored Jeremy.

6. Physical and Mental Health of Parents. The Court found that Jeremy was thirty-one (31) years old and in good health. April was thirty (30) years old and confined to a wheelchair. Both parties were in good mental health. However, the Court also found that April was unduly controlled by her mother, Laura Michael. The Court found that as to physical and mental health, this factor favored Jeremy.

7. Emotional Ties of Parents and Children. The Court found that both Parties loved the children and had close emotional ties. Thus, the Court found that this factor favored neither Party.

8. Moral Fitness. The Chancellor found that April was a stronger factor in the Children going to church and that this factor therefore favored April. This was the ***only*** factor which the Court found favored April.

9. Home, School and Community Record of Children. The Court found that the children were allowed more extra-curricular activities when in the care of Jeremy. April chose not to enroll the children in any activities. The Court found that this factor slightly favored Jeremy.

10. Preference of Children. The Court found this factor inapplicable as neither child was of age to express a preference.

11. Stability of the Home Environment. The Court found that Jeremy had a stable employment history and a stable residence since the Parties' separation. However, April had moved twice since the separation and was in financial distress. The Court found this factor favored Jeremy.

12. Other Factors. The Court found that April, through her mother's instigation, had continually kept the false allegations of sexual abuse at the forefront of Kelsi's life. The court found that the allegation was doubtlessly put into the child's mind by April and her mother Laura. The Court found that this, as an "other factor," favored Jeremy.

(*See* R. p. 186-91).

A. The Chancellor properly considered April's physical disability, but did not overemphasize this factor.

Appellant simply argues that the Chancellor placed "too much emphasis" on her physical disabilities in its *Albright* analysis. Appellant then embarks on a diatribe tacitly accusing the Chancellor of disability discrimination. This argument flies in the face of the facts in the Record and the Chancellor's opinion in this case.

First of all, in ruling on April's post-trial Motion the Chancellor explained that he had not placed undue weight on April's disabilities. In fact, the Chancellor stated that "[t]he Plaintiff's disability . . . was ***the least of the Albright factors*** upon which a determination by the Court was made that the best interests of the children were to be with their Father." (R. p. 237) (emphasis added).

The undisputed proof at trial was that April Watkins was confined to a wheelchair, could only take a few steps on her own and was legally blind. April could not drive a vehicle and used a magnifying glass to read due to optic nerve damage. It would have been reversible error for the Court to have wholly ignored these physical limitations. A parent's physical and mental health is one of the twelve factors enumerated by the Supreme Court in *Albright*. *Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983) (holding that "physical and mental health and age of the parents" should be considered in making a custody determination).

April admitted at trial that her physical limitations required her to rely on others and precluded her from some activities of parenting. April explained that she could not simply put her children into a car and take them somewhere. Rather, transportation had to be arranged through a third-party. April testified she would rely largely on her parents or other family who lived nearby. However, the undisputed proof showed that April's parents were over-the-road truck drivers who were often away for a month at a time.

In her Brief April relies on *Caswell v. Caswell*, 763 So. 2d 890, 892 (Miss. Ct. App. 2000). In *Caswell* the father had sustained an on-the-job injury to his neck which resulted in neck surgeries and his taking of various medications. *Caswell*, 763 So. 2d at 892. However, the Record in *Caswell* established that the father's "disability did not prevent him from adequately being able to care for his children." *Id.* The Trial Court awarded custody to the father, and the Court of Appeals affirmed. *Id.* at 895. The Court explained that "[r]egardless of what we would have held if we were the deciding judge, so long as the chancellor had a factual basis to ground his opinion and applied the correct legal standard we are not at liberty to intervene." *Id.* at 893.

Caswell offers no support to April and, in any event, is completely different from the facts of this case. In *Caswell*, the father's injury did not interfere with his ability to care for the children to any extent. In this case, April is unable to stand for any length of time, unable to walk any significant distance, is legally blind and cannot drive. Clearly, April's disability makes normal aspects of childcare more difficult. Her disability prevents her from transporting the children on her own and reduces the activities in which they can engage in their mother's care.

Moreover, the Court in *Caswell* did not hold that the father's disability should not be considered, but rather simply held that the Chancellor had not erred by awarding custody to the father after considering all of the *Albright* factors, including his physical condition. The father's injured condition was a consideration in *Caswell*. Since the Chancellor found that the father's condition did not impair his ability to care for the children, and as this finding was supported by evidence in the record, the Court properly affirmed the Chancellor's decision.

The fact that April was in a wheelchair and unable to drive was merely one factor properly considered by the Trial Court. The fact of April's disability and limitations is

established by the Record. The Court did not overemphasize this factor. In fact, the Court held that this factor was afforded the least weight in the *Albright* analysis.

April next refers the Court to two California cases: *In re Marriage of Carney*, 24 Cal. 3d 725, 736 (Cal. 1979) and *In re Marriage of Levin*, 102 Cal. App. 3d 981 (Cal. 1980). Yet, neither of these cases support her arguments either. For instance, the Court in *Carney* explained:

> In particular, if a person has a physical handicap it is impermissible for the court simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual and the family as a whole. To achieve this, the court should inquire into the person's actual and potential physical capabilities, learn how he or she has adapted to the disability and manages its problems, consider how the other members of the household have adjusted thereto, and take into account the special contributions the person may make to the family despite -- or even because of -- the handicap. ***Weighing these and all other relevant factors together, the court should then carefully determine whether the parent's condition will in fact have a substantial and lasting adverse effect on the best interests of the child.***

In re Marriage of Carney, 24 Cal. 3d 725, 736 (Cal. 1979) (emphasis added). The Chancellor in this case did exactly what the Court suggested in *Carney*. That is, he weighed all of the appropriate factors, including whether April's disability will actually have an effect on her ability to care for the children. The Court placed minimal reliance on the fact that April is somewhat limited because of her condition. This was but one factor used in making the custody determination just as contemplated by *Carney*.

Similarly, the Court in *Levin* stated that

> Health or physical condition of the parents ***may be taken into account*** in determining whose custody would best serve the child's interests, but that ordinarily this factor was of minor importance and that the court must view the handicapped parent as an individual and the family as a whole.

In re Marriage of Levin, 102 Cal. App. 3d at 986 (emphasis added).

Again, the Chancellor's opinion completely conforms to the reasoning of *Levin*. The Chancellor considered April's disability and her limitations, but assigned this the most minor weight of all the *Albright* factors.[3]

It was not error for the Court to consider April's disability along with the other *Albright* factors, since a parent's disability is one of the enumerated *Albright* factors. It would have been error for the Chancellor to ignore April's disability. The Chancellor's conclusion that April's disability was at least a factor in her ability to care for the children was supported by overwhelming, if not undisputed, evidence in the record. The Chancellor assigned this factor the least weight in the *Albright* analysis, and relied on all of the factors in making the custody award. The Trial Court did not err in this regard.

B. <u>The Chancellor's factual finding that Ralph Watkins did not abuse the minor child was supported by overwhelming Record evidence.</u>

April's Brief next claims the Chancellor erred by finding that paternal grandfather Ralph Watkins had not molested Kelsi and by not restricting Ralph Watkins' access to the children.

This Court, of course "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000). The Chancellor's factual findings are affirmed so long as they are not "manifestly wrong" or "clearly erroneous." *Ferrara v. Walters*, 919 So. 2d 876, 881 (Miss. 2005). Regarding such factual findings, the Supreme Court has explained:

> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the

[3] Quizzically, April's brief claims the Court erred in considering the guardian *ad litem's* report while discussing April's disability. The guardian *ad litem* recommended that custody be awarded to Jeremy. (R. p. 159). The guardian *ad litem* was appointed because of the allegations of sexual abuse by Ralph Watkins. (R. p. 184). The Court found, as a matter of fact, there had not been any sexual abuse by Ralph Watkins. (R. p. 184). Thus, the Court did not consider the guardian *ad litem's* report as to the remaining issues. (R. p. 185). Since the Chancellor expressly did not consider the guardian *ad litem's* recommendation, April's arguments in this regard are moot.

interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

Clark v. Clark, 754 So. 2d 450, 462 (Miss. 1999).

This Court will affirm a Chancellor's finding that abuse allegations were unsubstantiated unless the finding is clearly erroneous. *Potter v. Greene*, 973 So. 2d 291, 293 (Miss. Ct. App. 2008). Further, such false allegations of abuse are a legitimate consideration in deciding child custody. *Potter*, 973 So. 2d at 294. (modifying custody based in part on unsubstantiated allegations of abuse); *S.C.R. v. F.W.K.*, 748 So. 2d 693, 701 (Miss. 1999) (natural parent lost custody due to false allegations of sexual abuse).

April ignores the overwhelming evidence in the Record from which the Chancellor could, and did, find that the allegations of sexual abuse against Ralph Watkins were wholly false.[4] First of all, Kelsi allegedly first made the disclosure to her grandmother, Laura Michaels, when she was only twenty-three (23) months old. However, Kelsi was never taken to a hospital and the allegation was not reported to law enforcement, DHS or anyone else. A registered nurse examined Kelsi in her parents' home, and found nothing indicative of abuse. Moreover, April Watkins did nothing after Kelsi allegedly made the statement. Ralph and his wife Darlene continued to keep Kelsi overnight for several nights each week. April knew that Ralph was alone with Kelsi, but was unmoved to action for almost three (3) years, until she began contemplating a divorce from Jeremy. These facts alone were ample basis for the Court to question whether Kelsi made such an allegation in February 2005 in the first place.

[4] Again April's Brief mistakenly claims that the Court gave "improper credence" to the guardian *ad litem's* report and credited the report over other evidence. The Chancellor stated that he found, based on the evidence at trial, that Ralph Watkins had not abused Kelsi and that the allegations were false. (R. p. 185). The Court made this finding "exclusive of both the Guardian *ad litem* Reports." (R. p. 185). Thus, the Chancellor stated he did not consider the reports in making the decision. (T. p. 185).

Next, as to the second allegation made in December 2007, the evidence showed that April's mother Laura was again involved. Kelsi allegedly told April that Ralph Watkins had touched her after she was questioned immediately following a visit with Laura. In the wake of this allegation, Ralph Watkins maintained his innocence, cooperated with law enforcement and took and passed a polygraph examination. A forensic medical examination was conducted. There were no physical findings whatsoever of abuse of Kelsi. Further, Kelsi later recanted the allegation and said that she had just been "tricking" her mother.

Every witness who could have had any personal knowledge exonerated Ralph Watkins from the allegations. Ralph was frequently observed by his wife Darlene and his daughter April Rae while with the children. Both witnesses testified that Ralph had never done anything inappropriate. Similarly, Xander observed Ralph with Kelsi and testified that Ralph had never touched Kelsi inappropriately. Finally, Ralph himself adamantly denied that he had touched Kelsi. The Chancellor, of course, was fully entitled to believe this evidence.

The evidence also showed that Ralph was never indicted with any crime and the criminal investigation was promptly ended. The Department of Human Services likewise ended its investigation.

The only conflicting evidence at trial consisted of hearsay statements from Kelsi. There was no physical evidence of abuse and none of the witnesses claimed to have any personal knowledge of abuse. Moreover, Laura Michaels gave inconsistent versions of what Kelsi had allegedly told her regarding the details of abuse.

The Chancellor was not bound to accept that Ralph Watkins had abused Kelsi in the face of such overwhelming evidence to the contrary. The Court was not bound to accept the conclusions of DHS worker Jill Franks, who believed that Kelsi had been abused. First of all,

the Trial Court was the sole judge of the facts in this case and was not required to credit any one witnesses's testimony over the other evidence. Moreover, Jill Franks' knowledge was based solely on Kelsi's hearsay statements, which were later undermined when the child said she had been tricking her mother. Moreover, Franks interviewed Kelsi without the knowledge of Kelsi's previous alleged disclosures in 2005, April's actions after 2005 and subsequent interrogation by April and her mother.

It is not required that the Chancellor's conclusion have been supported by such overwhelming evidence in the record in order to be affirmed as the decision would be affirmed if supported by any reasonable proof in the Record. However, the Chancellor's conclusion in this case is supported by overwhelming record-evidence. The proof at trial established that the allegations against Ralph Watkins were false. The Chancellor did not err in making this determination.

Since the Chancellor's finding that Ralph Watkins did not sexually abuse Kelsi is supported by overwhelming evidence the Court's decision should be affirmed.

C. The Chancellor properly considered each *Albright* factor and made appropriate factual findings supported by the evidence produced at trial.

April makes several last-ditch arguments urging reversal of the Chancellor's decision. Essentially, April tacitly concedes that the Chancellor made findings as to each *Albright* factor, and that the findings were supported by evidence in the Record, but she asks this Court to re-weigh the evidence and to find in her favor. Each of April's arguments is addressed in turn.

First, April points out that the Chancellor found that the presumption against custody of Miss. Code Ann. § 93-5-24(9)(a) was inapplicable in this case. The Chancellor found that there was never any serious bodily injury inflicted upon April and there was never any pattern of family violence committed by Jeremy.

Pursuant to Miss. Code Ann. § 93-5-24(9)(a), the Chancellor was required to "make written findings to document how and why the presumption was or was not triggered." MISS. CODE ANN. § 93-5-24(9)(a). This Court defers to a Chancellor's decision as to whether there was sufficient evidence of domestic violence to trigger the presumption. *C.W.L. v. R.A.*, 919 So. 2d 267, 272 (Miss. Ct. App. 2005). Moreover, even evidence of yelling, screaming and occasional slapping may not rise to the level necessary to trigger the presumption. *C.W.L.*, 919 So.2d at 272 (Chancellor's finding that presumption not triggered affirmed where "general yelling and screaming which, on a few occasions, resulted in slapping and perhaps one incident of choking . . . and there was no serious or even moderate injuries resulting from the same.").

The Chancellor in this case found there was no evidence of any incident involving serious bodily injury, nor any evidence of a pattern of violence. The Chancellor was completely correct in his findings. Notably, April does not even argue otherwise in her Brief. (Brf. of Appellant at 35). The only possibly evidence which April could be referring to was April's claim that Jeremy once grabbed his cellular telephone away from her. (T. p. 57). April claimed Jeremy left a mark on her arm when he grabbed the phone because he was determined to get it away from her. (T. p. 56-57). Jeremy was never charged with assault, or anything else. (T. p. 57). April never sought any treatment of any kind. (*Id.*).

There is no evidence that April was ever injured, even slightly, by Jeremy. There was no credible evidence that Jeremy engaged in any domestic violence, much less a pattern of domestic violence. To the contrary, the proof showed that Jeremy was a normal, hard-working stable father who cared for his children. The evidence reflected that Jeremy spent his time working to support his family, or with his children.

The Chancellor correctly found that there was no presumption against Jeremy having custody. Indeed, this was the only possible conclusion based on the evidence presented at trial. There was simply no evidence of any domestic violence which could trigger the presumption of section 93-5-24(9)(a).

Next, April takes issue with the Court's finding that the health and sex factor favored Jeremy. As noted, the Court found that the continued attention to Kelsi and the pursuit of the false allegations of sexual abuse were bad for the child. As discussed above, there is plenty of evidence to support this finding. The Court found, as a matter of fact, that the allegations were baseless but April and her mother nevertheless pursued the false charges.

April argues that the Court erred in finding that the continuity of care factor favored neither party. However, the evidence showed that the children were left in the care of grandparents, or Jeremy's sister April Rae, for several nights each week. This was largely at the request of April, who claimed she needed a "break" from the children. At other times, April would send the children to Jeremy's parents so they could engage in some activity to which she could not transport them.

The Court concluded that neither party had provided more care than the other, but that they had both relied on family to provide primary care. This is exactly what the record reflects. When the children are in April's care, she often had them stay with one of her family members. The children were in the care of family members other than their parents for several nights each week. Thus, the Court properly concluded that this factor favored neither party.

April next claims that the Chancellor erred in finding that the parenting skills factor favored Jeremy. However, again here, there is ample evidence which supports the Chancellor's finding. First of all, it was undisputed that Jeremy was a good parent. Jeremy was attentive to

his children and enrolled them in worthwhile activities. April, in contrast, did not allow the children to enroll in similar activities. Further the Court again found that April's continued pursuit of patently false allegations against Ralph Watkins exhibited poor parenting skills. The Record manifestly supports the Chancellor's findings in this regard.

April also argues that the employment of the parents factor should have favored her. The Record shows that while Jeremy had often worked overtime hours during the marriage, his work schedule had changed such that he usually worked forty (40) hours per week as of the trial in this case. Jeremy's work days started early such that he was always home in time to pick the children up from school. Jeremy did not work nights or weekends and could both provide for the children and spend time with them. Jeremy also testified that he would be able to alter his work schedule to spend even more time with the children in the future.

A parent's ability to pick up the children from school weighs in favor of that parent as to this factor. *Watts v. Watts*, 854 So. 2d 11, 15 (Miss. Ct. App. 2003). Further, a parent with stable employment may be favored in this factor over an unemployed parent, even though the unemployed parent would have more free time. *Sumrall v. Sumrall*, 970 So. 2d 254, 258 (Miss. Ct. App. 2007) (favoring employed parent over parent who would have more time for children due to "lax employment situation").

Jeremy is able to pick the children up everyday from school, where April is unable. Jeremy has a stable job that does not unduly interfere with his parenting. Jeremy has time to care for the children and could modify his schedule for additional time in the future. The Chancellor properly found, based on all the evidence, that this factor favored Jeremy.

April's Brief again asserts that the Chancellor afforded too much weight to April's physical limitations. As discussed above, this is untrue. April fails to mention that the Court expressly stated that it was allowing this factor the least weight of any *Albright* factor.

As to April's argument regarding her mental health, the Court explicitly stated that the Parties' mental health was not a factor. Essentially, the Court noted that while it had its doubts about April due to her actions, no mental health issues were proven. Accordingly, the Court did not consider any mental health problems. This is a non-issue.

April next claims that the Chancellor erred in finding that the emotional ties factor favored neither Party. The Chancellor found that both parents had close emotional ties with the children. April points to no evidence which established that April had closer emotional ties to either child. Simply pointing out that there was a "special bond" between Xander and his mother is insufficient. There was likewise a close bond between both children and Jeremy. This fact was undisputed at trial. The Chancellor did not err in finding that this factor favored neither Party.

April claims that the Chancellor erred in weighing the home, school and community record factor in favor of Jeremy. However, there can be no dispute that this decision is supported by evidence in the Record. The Chancellor found that Jeremy sees that the children are involved in extra-curricular activities. The Children participate in gymnastics, baseball and a 4-H club in Corinth. The children were well-adjusted and had many friends in Corinth. However, there was evidence that the children just sit in April's home and watch television when they are with her. This is ample evidence for this factor to favor Jeremy. *See, e.g., Marter v. Marter*, 914 So. 2d 743, 750 (Miss. Ct. App. 2005) (parent favored based on involvement in extra-curricular activities).

April complains that the stability of the home environment factor should have weighed in her favor. The evidence, however, established that Jeremy's home was more stable. Jeremy had not moved since he and April had relocated from Alabama to Corinth. He stayed in the community in which the children were accustomed and surrounded by close family. April, on the other hand, moved twice since the Parties' separation.

A Chancellor may properly weigh one parent's relocations against that parent in this *Albright* factor. *Brock v. Brock*, 906 So. 2d 879, 887 (Miss. Ct. App. 2005). Obviously, the Court could find Jeremy's home life more stable than April's based upon this evidence.

April takes issue with the Court mentioning her precarious financial situation, when Jeremy had financial problems of his own. However, the evidence showed that Jeremy was gainfully employed in a steady job. April's only income was her disability checks. Moreover, Jeremy's parents testified that they stood ready to offer financial or other necessary assistance if needed. April's situation, in contrast, was tenuous.

Based on all of the evidence presented, Jeremy's situation was far more stable that April's. This factor properly favored Jeremy.

Finally, April claims that the Chancellor erred by considering the pursuit of the false sexual abuse allegations in the discussion of the other relevant factors prong of *Albright*. Unfounded accusations of abuse are properly considered in a custody decision. *Potter*, 973 So. at 294 (modifying custody based in part on pursuit of unfounded allegations of abuse).

Again, as discussed fully above, the Court had ample evidence from which to find that the allegations against Ralph Watkins were patently false. The Court properly considered it detrimental to the minor children that the mother would continue to press the allegations, and cut-off the children from all contact with anyone who dared disagree with her. As a result of the

mother's actions, and the actions of her mother in encouraging the claims, the children were isolated from one set of the grandparents and their great grandmother, with whom they had enjoyed an extremely close relationship. Kelsi was subjected to repeated interrogation and an invasive medical examination. The Court properly considered this in its *Albright* analysis.

The Court also noted, in addressing April's post-trial Motion, that placing Kelsi in Jeremy's custody was clearly in her best interests, and the Court considered it in both children's best interests not to separate the siblings. This conforms with the Court's ruling in *Owens v. Owens*, 950 So. 2d 202, 207 (Miss. Ct. App. 2006) (holding that "our case law makes it clear that keeping siblings together is assumed to be in the best interest of a child, absent a showing that the circumstances in a particular case are to the contrary.").

The Court considered all of the evidence in the record, evaluated each of the *Albright* factors and made express findings as to each factor. All of the Court's findings are supported by evidence in the Record. April simply disagrees with the Court's analysis and asks this Court to view the evidence differently.

Of course, April is not entitled to this relief. Since the Chancellor properly considered each factor and his findings are supported by substantial evidence in the Record, the Chancellor's decision should be affirmed.

III. CONCLUSION

The Chancellor in this case properly evaluated all of the *Albright* factors in awarding custody of the minor children to Jeremy Watkins. April's argument simply challenges the Chancellor's decisions, which are pursuant to Mississippi law, vested in the discretion of the Chancellor. April's arguments are similar to those presented in *Marter v. Marter*, 914 So. 2d 743, 750 (Miss. Ct. App. 2005) where the Court explained:

> Mother's arguments, in essence, simply challenge the chancellor's conclusions. Having thoroughly reviewed the record, we conclude that the chancellor applied the correct legal standard and properly applied the *Albright* analysis. Our review reflects that there was substantial, credible evidence to support the chancellor's decision, and we are unable to conclude that the chancellor abused his discretion in concluding that Father's evidence was more convincing than the evidence offered by Mother. It is not within our authority to substitute our judgment for that of the chancellor's. This Court's duty is to conduct an appellate review consistent with the appropriate legal standards; it is neither our duty nor our intention to micro-manage the conduct of the trial courts and to substitute our judgment for that of the trial judge. We, therefore, affirm the chancellor's decision to modify the custody decree and award paramount physical custody of the children to Father.

The Chancellor's decision is supported by substantial evidence, indeed overwhelming evidence, in the record. Accordingly, Appellee Jeremy Watkins requests the Court to affirm the Chancellor's decision in all respects.

RESPECTFULLY SUBMITTED, this the 20th day of August, 2010.

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellee** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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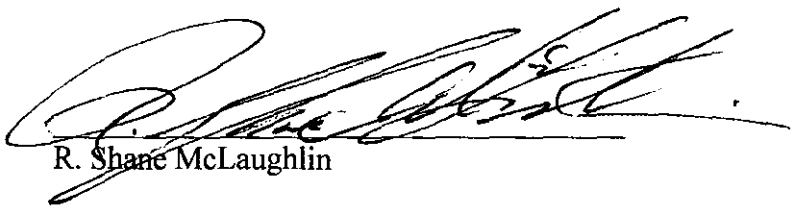
Hon. John A. Hatcher
Chancellor
P.O. Box 118
Booneville, MS 38829

This the 20th day of August, 2010.



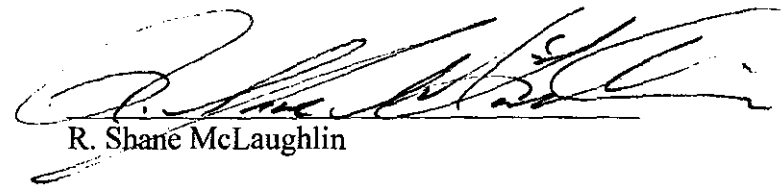
R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellee in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellee** by mailing the original of said document and three (3) copies thereof via First Class Mail, postage pre-paid, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 25th day of August, 2010.



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