IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CIVIL CAUSE NO.: NO. 2009-CA-01701

APRIL M. WATKINS
APPELLANT

VS.

JEREMY R. WATKINS
APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

APPEAL FROM THE CHANCERY COURT OF ALCORN COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

CIVIL CAUSE NO.: 2009-CA-01701

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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 on Appeal
4. Phil R. Hinton, Attorney for Appellant at trial
5. R. Shane McLaughlin and Nicole H. McLaughlin, Counsel for Appellee on Appeal
6. Daniel K. Tucker, Counsel for Appellee at trial
7. Honorable John A. Hatcher, Chancery Court Judge Alcorn County

This the 17th day of May, 2010.

AMY D. SALING (MSB NO. 101736)

Attorney of Record for Appellant,
April M. Watkins

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1. The Chancery Court erred in its Opinion and Judgment Dated August 14, 2009 and Final Judgment Dated September 21, 2009 Awarding Jeremy Watkins Primary Physical Custody of the Minor Children.

    A. The Court gave improper consideration of April Watkins' disability when determining primary physical custody of the minor children by overemphasizing the mother's disability without adequate consideration of other relevant factors.

    B. The Court gave improper consideration of alleged abuse by the paternal grandfather when determining primary physical custody of the minor children by disregarding compelling evidence of that abuse and finding no sexual abuse occurred.

        a. The Court gave improper credence to the Report and Supplemental Report of the Guardian Ad Litem when determining who should be awarded primary physical custody of the minor children and did not give proper credence to the testimony of DHS investigators and case workers who conducted extensive investigations and interviews regarding the minor children.

    C. The Chancellor Erred as a Matter of Law in Failing to Make Appropriate Findings as to Each Factor under *Albright*, and the Chancellor's Opinion and Judgment and Final Judgment Should Be Reversed and This Court Should Render an Opinion as to Custody of the Minor Children.

II. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On May 28, 2008, Appellant, April M. Watkins, filed her Complaint for Divorce on the grounds of Habitual, Cruel and Inhuman Treatment as set forth in Miss. Code of 1972 as Ann., and amended, Sect 93-5-1 et seq.; or in the alternative on the statutory ground of Irreconcilable Differences as set forth in Miss. Code of 1972 as Ann., and amended, Sect. 93-5-2 et seq. (R.1, R.E. 046). On that same day, a Rule 4 Summons and Rule 81 Summons was issued for Jeremy R. Watkins. The Complaint for Divorce was served and returnable on June 18, 2008. An Order for Trial Setting was filed on June 2, 2008 setting the temporary hearing for June 18, 2008. (R. 7, R.E. 047).

On June 30, 2008, Appellee, Jeremy R. Watkins filed an Answer and Counter-Complaint on the grounds of Habitual, Cruel and Inhuman Treatment as set forth in Miss. Code of 1972 as Ann., and amended, Sect 93-5-1 et seq.; or in the alternative on the statutory ground of Irreconcilable Differences as set forth in Miss. Code of 1972 as Ann., and amended, Sect. 93-5-2 et seq. (R.1, R.E. 046).

On June 20, 2008, Appellee, Jeremy R. Watkins filed a Waiver of Process and Entry of Appearance. (R. 18, R.E. 048).

On June 30, 2008, Chancellor, Talmadge D. Littlejohn, entered his Order of Recusal from the case. (R. 19, R.E. 049).

On July 28, 2008, Appellant, April M. Watkins filed her Answer to Appellee's Counter-Complaint. (R. 20-23, R.E.050-053).

On August 13, 2008, there was a hearing in this matter which resulted in a Temporary Agreement.

On September 11, 2008 a Temporary Order was entered granting the following:

a. April Watkins shall have the primary care, custody and control of the parties' minor children, Kelsie Dawn Watkins and Alexander Rafe Watkins.

b. The Defendant, Jeremy Watkins, shall have visitation with the children every other weekend from 7:00 p.m. on Friday until 7:00 p.m. on the following Sunday, beginning with Friday, August 15, 2008, and continuing every other weekend thereafter until further order of this Court.

c. The parties shall exchange the children at the beginning and end of the visitation provided for herein, at a point which is approximately halfway between the residence of the Plaintiff, in Leoma, Tennessee, and the Defendant, in Corinth, Mississippi, said point being Hardee's restaurant at the intersection of Highway 72 and Highway 43 in Muscle Shoals, Alabama.

d. In the event that the Plaintiff is unable to obtain the assistance of someone to deliver and pickup the children at the meeting point specified herein, she shall notify the Defendant that he will need to make arrangements for all transportation for that weekend and Plaintiff will make every effort to give him that notice at least forty-eight (48) hours in advance. In the event she is unable to deliver and pickup the children on any given weekend as provided herein, the Defendant shall receive a credit for $50.00 toward his child support obligation.

e. The Defendant will not expose his children to the children's paternal grandfather, Ralph Watkins, and he shall not entrust his children to anyone who will expose the children to Ralph Watkins during visitation or otherwise.

f. The Defendant shall pay to the Plaintiff, as child support, the sum of $232.55 per week, and said amount shall be paid beginning with Friday, August 15, 2008, and thereafter shall be paid on each Friday thereafter until further order of the Court,

g. The Defendant shall continue to maintain medical insurance for the benefit of the parties' children, and he will make the co-payments, if any, for their medical treatment. The Defendant will provide Plaintiff with all cards and other documents she will need to obtain medical treatment.

h. The parties will apply for coverage through both the Defendant's insurance, through his place of employment, and TennCare, in an effort to reduce or eliminate medical expenses for the children.

i. The Defendant shall have the exclusive use and possession of the parties' marital home in Alcorn County, Mississippi, and he shall pay the mortgage and all of the expenses associated with the maintenance and repair of that property, as and when due.

j. There are two automobiles owned by the Defendant, which are in his father's name. The Defendant shall pay any indebtedness on said automobiles as and when due.

k. The parties are affirmatively enjoined from disposing of any property pending final hearing of this cause.

l. The Plaintiff shall be entitled to the clothing and personal effects of the children which remain in the marital home, and the Defendant shall have access and use of said clothing and personal effects for visitation. The children will also be allowed to move their toys between the homes of their parents as they so desire.

m. The Plaintiff is awarded the exclusive use and possession of her power wheelchair charger, her bookshelf, her second wheelchair, the Nintendo charger, the plastic table and chairs from the deck and to one-half of the dishes, pots, pans and flatware. In the alternative, the Defendant may provide the Plaintiff with suitable replacements for one-half of the dishes, pots, pans and flatware.

n. The front porch rocking chairs, the children's television set and the DVD players, as well as all of the other personal property not itemized herein, shall remain the possession of the Defendant until further hearing.

o. The Defendant shall hold, uncashed, the tax stimulus or refund check in the sum of $1,800 pending further hearing in this cause.

p. In all domestic cases involving custody or visitation of minors, and even though no order of custody or visitation may have been entered, each party shall keep the other informed of his/her full address, including state, city, street, house number and telephone number, if available, unless excused in writing by the Court. Within five days of a party subject to this rule, changing his or her address, he or she shall, so long as the children remain minors, notify in writing the Clerk of the Court, Bobby Marolt, Chancery Clerk of Alcorn County, with has entered the order providing for custody and visitation of his/ her full new address and shall furnish the other party a copy of such notice. The notice shall include the Court file number. The Clerk shall docket and file such notice in the cause. Every order respecting custody or visitation should contain a provision incorporating the terms and requirements of above. The purpose of this rule is to

prevent a parent from concealing from others the address and whereabouts of the children. Willful failure to comply with this rule may be treated as a contempt. Failure to file with the Clerk the notice required by this rule shall create a rebuttable presumption that written notice was not given to the other party.

q. All matters not specifically added herein are held in abeyance pending final hearing. (R. 41-45, R.E. 054-058)

On January 6, 2009, The Plaintiff filed a Motion for Leave to Amend and attached as Exhibit 1, an Amended Complaint. (R. 85-94, R.E. 059-067).

On February 20, 2009, the parties filed a Consent to Divorce on the Ground of Irreconcilable Differences. However, in said Consent the parties left the following issues to the Court to decide: 1. Custody of the parties children; 2. The non-custodial parent's visitation rights; 3. The restrictions, if any, to be placed upon contact with the children's paternal grandparents, Ralph and Darlene Watkins; 4. Determination of marital property and division of that property; 5. The parties' responsibilities for the debts they have incurred; 6. Child Support; 7. Medical insurance for the children; 8. Alimony; and 9. Attorney's fees. (R. 112-114, R.E. 068-070)

On April 2, 2009, the Plaintiff filed a Motion for Citation for Contempt regarding the Defendant's refusal to pay child support. (R. 126, R.E.071)

On May 7-8, 2009 the Parties returned to Court for hearing on all issues that the parties could not agree.

On April 22, 2009, the Defendant filed his Answer to Motion for Citation of Contempt. (R. 129-132, R.E. 072-075).

On May 22, 2009, The Court entered an Order Appointing Rhonda N. Allred as the Guardian Ad Litem. (R. 145, R.E. 076)

On June 19, 2009 the parties returned to Court as a continuation of the hearing which

began on May 7, 2009. This case was again adjourned and continued to July 20, 2009.

On July 24, 2009, the Guardian Ad Litem filed her report with the Court and per an Order of the Court, the Judge directed the Guardian Ad Litem to file another Supplemental Report as the initial reports did not address all the concerns of the parties. On July 27, 2009, the Guardian Ad Litem filed her Supplemental Report. (R. 147-163, 164-169, R.E. 077-093, 094-099).

The Court allowed an additional day, August 6, 2009, to question the Guardian Ad Litem on her report.

On August 14, 2009, the Court entered it's thirty-three (33) page Opinion and Judgment in this matter. (R. 181-213, R.E. 005-037).

On August 24, 2009, the Plaintiff filed a Motion to Reconsider and on August 25, 2009, the Court entered an Order Granting Additional Time for Plaintiff to File and Provide New Evidence. (R. 215-220, R.E. 100-105).

On September 21, 2009, the Court entered it's Final Judgment and denied the Plaintiff's request for a new trial, reconsideration, or other relief. (R. 235-242, R.E. 038-045).

On October 19, 2009, the Plaintiff filed her Notice of Appeal to the Supreme Court and on October 28, 2009, filed the Certificate of Compliance. (R. 249-250, R.E. 106-107).

2. STATEMENT OF THE FACTS

April D. Watkins is an adult resident citizen of Lawrenceburg, Tennessee and Jeremy R. Watkins is an adult resident citizen of Alcorn County, Mississippi. They were married on October 13, 2001 in Lauderdale County, Alabama and were separated on or about May 23, 2008 in Alcorn County. There were two (2) children born of said union, namely Alexander Rafe Watkins (a/k/a Xander), born on May 10, 2002 and Kelsi Dawn Watkins, born on March 13,

2003. (R. 1, R.E. 046).

While there were multiple issues ruled upon at the divorce hearing in this matter; the issue of this appeal is the Chancery Court's error in it's Judgment awarding Jeremy Watkins primary physical custody of the parties minor children. More specifically, the court gave improper consideration to the disability of April Watkins by overemphasizing the mother's disability without adequate consideration of other relevant factors and gave improper consideration to the alleged abuse allegations by disregarding compelling evidence as to said abuse. The Court also gave improper credence to the Guardian Ad Litem's report and supplemental reports and did not give proper credence to the testimony of DHS investigators and case workers who conducted extensive investigations and interviews regarding the minor children.

A. Disability of April Watkins

April Watkins is a healthy, 30 year old, mother. She was in a car accident on October 19, 1996 when she was 17 years old. (T. 20, R.E. 109). As a result of the car accident she uses a wheelchair as an incomplete paraplegic and suffers from an optic nerve condition which affects her eyesight. April is able to walk and/or stand for short periods of time with the assistance of a walker or other object to hold on to, but because of her eyesight is unable to drive (T 21, R.E. 110). She testified that she can see well enough to read to the kids and can read even better with a magnifying glass. (T. 77, R.E. 115). She remains hopeful that there will soon be a treatment and/or operation for her optic nerve condition to enable her to drive again. April has adapted to her way of life and learned how to adjust her surroundings so that she can function much like anyone else. April had this condition when she married Jeremy in 2001and Jeremy was aware of the limitations that April had at that time. In spite of her disability April carried to full term and

gave birth to their two (2) children Alexander Rafe Watkins (Xander), born on May 10, 2002 and Kelsi Dawn Watkins, born on March 14, 2003. From the time that the children were born until the date of the final hearing in this matter, April took care of the minor children. (T. 23, R.E. 112). During this time Jeremy was working forty (40) to sixty (60) or more hours per week. At the time of separation he was working day shifts leaving the home at around 4:00 a.m and returning home around 5:30 p.m. (T. 24, R.E. 113). While the children were little and before they attended school, April was the only one home with the children on a regular basis. (T.24, R.E. 113). April has always been surrounded with family, friends, and other individuals who could assist with transportation of the children when needed and she has never had a problem in this regard. (T. 26, R.E. 114). April testified that she has many grandparents, aunts, uncles, cousins and other family members who live around her in Lawrenceburg, Tennessee that are available to assist with transportation of her and her children and her sister is only ten (10) minutes away. While April had temporary custody of the children, the kids were transported to school by the school bus. (T. 79, R.E. 117). April testified at the hearing in this matter that she is able to take care of the kids and clean the house. (T. 77, R.E. 115). She can stand to do laundry and do dishes and anything else she needs to stand to do but for the most part she sits in the chair. (T. 78, R.E. 116).

When considering the Albright factors, the court relied heavily on the fact that the children's best interest and safety would somehow be jeopardized by April's disability and in turn penalized April when her disability had not been shown to adversely affect the welfare of the minor children. (R. 181, R.E. 005). However, the same court gave April temporary custody of the parties' minor children in the interim period while this case was going on. In the final hearing, the court gave improper consideration to the disability of April Watkins when

determining physical custody of the minor children.

B. Abuse Allegations by Paternal Grandfather

Prior to the divorce proceedings, there were two (2) alleged incidents of sexual abuse concerning the parties minor child, Kelsi Dawn Watkins by her paternal grandfather, Ralph Watkins. There was testimony to this subject by several family members, DHS investigators as well as a court appointed guardian ad litem who subsequently filed an initial report and supplemental report. Laura Michael, April Watkin's mother, testified that shortly before Kelsi's second birthday in 2005, Kelsi disclosed to her that her Pops touches her pee pee. Kelsi and Xander were visiting with Laura Michael and Ricky Michael, their maternal grandparents, when Kelsi disclosed this abuse to Laura. Laura was changing Kelsi's diaper when she told her that "this is your pee pee and no one is supposed to ever touch you down there, and if they ever do, just tell Nana, and Nana will get them." Laura testified that after she said this, Kelsi replied, "Pops does". Pops is Kelsi and Xander's paternal grandfather, Ralph Watkins. Laura went on to testify that Kelsi demonstrated for her what Pops does by taking her index finger and putting her finger in her vaginal area, picking up her finger, and stating "Pops does this" and put her finger in her mouth. (T. 302, R.E. 131). Ricky Michael also testified that Kelsi told him and demonstrated to him the exact same thing immediately following the disclosure to his wife. (T. 407, R.E. 134). During this same visit, Laura Michael testified that Xander tried to position himself over Kelsi in an inappropriate manner while she was bathing the kids. (T. 308, R.E. 132). After this happened, Laura testified that she pulled Xander off of Kelsi and stated "Don't do that, did somebody show you how to do that?". Xander stated that Pops showed him that. Laura asked him if Gan-Gan, (the children's paternal grandmother, Darlene Watkins), knew and Xander said "uh-huh and Gan-Gan says Pops don't do that any more". Laura informed April of the children's

allegations and when the children returned home, Kelsi told Jeremy and April the same story that she told Laura and Ricky. (T. 97, R.E. 120) At that time April and Jeremy confronted Ralph and Darlene Watkins about the allegations and they were adamantly denied by Ralph. Jeremy and April had a friend who is a nurse come over to their house and examine Kelsi. From her exam, the nurse could not tell if anything had happened.

The allegations resurfaced in December of 2007 when Kelsi disclosed to April that Pops touches her all the time and again demonstrating by putting her hand on her pee pee and rubbing it. April testified that she asked Kelsi what she says when he does this and Kelsi stated "I say quit doing that but he doesn't quit because he just loves doing it". April and Jeremy again confronted Ralph and Darlene about the allegations and they were again denied. As this was the second time that Kelsi brought up the same allegations, April called the Sheriff's Office and in turn DHS became involved in a full investigation. Sarah Hall was the social worker assigned to the case and Jill Franks was the forensic investigator who interviewed Kelsi and Xander regarding the alleged abuse. The DHS file and reports are incorporated into the record herein and were made available to the attorneys and Judge in the initial hearing and the forensic examiner, Jill Franks, testified as to her findings and her reports. The case against Ralph Watkins was taken to the grand jury but no indictment was issued. Given all the evidence and testimony that was presented at the hearings in this matter and all the documentation that was made available to the court by DHS, the court relied heavily on a court appointed guardian ad litem's report and supplemental report when determining physical custody of the minor children and visitation restrictions of the paternal grandfather.

The lower court erred in it's Judgment awarding Jeremy Watkins primary physical custody of the minor children, and more specifically the court gave improper consideration to the

disability of April Watkins by overemphasizing the mother's disability without adequate consideration of other relevant factors and gave improper consideration of alleged abuse by disregarding compelling evidence as to that abuse. The Court also gave improper credence to the Guardian Ad Litem's report and supplemental reports and did not give proper credence to the testimony of DHS investigators and case workers who conducted extensive investigations and interviews regarding the minor children.

III. SUMMARY OF THE ARGUMENT

The standard of review for this case is substantial evidence. We submit the long-standing principle of appellate law dealing with the decision on the facts by the Chancellor which rule is set out in the 2009 case of *Webb, et al. v. Drewrey, et al.*, 4 So.3d 1078 (2007-CA-01935 SCT) (Miss. App. 2009) *[affirmed 02-24-09]*, which states:

> In a bench trial, the chancellor is the finder of fact and, thus, solely determines the credibility of the witnesses and the weight to be given to the evidence. This court gives great deference to a chancellor's finding of facts. Therefore, we will not disturb the finding of the chancellor when supported by substantial evidence **unless** the chancellor abused her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.

The Mississippi Supreme Court defines substantial evidence as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion or to put it simply, more than a mere scintilla of evidence." *Tucker v. Prisock.* 791 So.2d 190, 192 (Miss. 2001). Where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the Chancellor in error. *Hollon v. Hollon*, 784 So.2d 945, 946 (Miss. 2001)(citing *Jerome v. Strand*, 689 So. 2d 755 (Miss. 1997). In the case at hand, the chancellor's findings were not supported by substantial evidence and his discretion was manifestly wrong, clearly erroneous and an erroneous legal standard was applied. On this basis, the lower court's decision in granting primary physical custody of the parties' minor children to Jeremy Watkins should be overturned and the Court should render a decision as to the physical custody of the parties' minor children in favor of April Watkins.

The court gave improper consideration of April Watkins' disability when determining primary physical custody of the minor children by overemphasizing the mother's disability without adequate consideration of other relevant factors. Also, the court gave improper consideration of alleged abuse by the paternal grandfather when determining primary physical custody of the minor

children. The court disregarded compelling evidence of abuse.

In this case, the chancellor's findings were not supported by substantial evidence and his discretion was manifestly wrong and clearly erroneous. In making such a determination of child custody, the lower court failed to make a proper *Albright* determination and the court erred in placing primary physical custody of the children with Jeremy Watkins. On this basis, the lower court's decision in granting primary physical custody of the parties' minor children to Jeremy Watkins should be overturned and the Court should render a decision as to the physical custody of the parties' minor children in favor of April Watkins. *Albright v. Albright*, 437 So.2d 1003 (Miss.1983).

IV. ARGUMENT

A. Standard of Review:

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B. The Chancery Court Erred in it's Judgment Awarding Jeremy Watkins Primary Physical Custody of the Minor Children:

1. **The Court gave improper consideration to April Watkins' disability when determining primary physical custody of the minor children by overemphasizing the mother's disability without adequate consideration of other relevant factors.**

Appellant submits to the Court that this is a case of first impression wherein a lower court placed too much emphasis on a mother being bound to a wheelchair as a determining factor for custody. Appellant first addresses the issue that Mississippi case law is scant as to this issue. Appellant has looked to other states for authority on the issue and discusses it herein. Appellant urges the Court to give great consideration to the cases from other jurisdictions cited herein.

In any child custody case, the polestar consideration is the best interests of the child. *Brekeen v. Brekeen*, 880 So.2d 280, 283 (¶ 5)(Miss. 2004)(citing *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

The Court in *Caswell v. Caswell*, 763 So.2d 890 (Miss. App. 2000), does not directly challenge the disability of a parent as an issue against granting custody, but the lower court granted custody of the minor children to the father who was disabled. The Court of Appeals upheld the decision. The father In *Caswell* sustained an injury which left him totally disabled; however, he stayed at home and cared for his minor children while his wife and the mother of his children worked. His disability did not prevent him from adequately caring for his children. The Court stated that the time between the separation and the trial should be considered in determining continuity of care for the children. The children had been in the home with the father from the time of separation up to the time of trial. *Id.* (citing *Jerome v. Stroud*, 689 So.2d 755, 757 (Miss. 1997).

The Court's conclusions and rationale are equally true here. April Watkins' disability should not have been given overwhelming consideration when determining the best interests of the minor children. Additionally, April Watkins was given temporary custody of the minor children between separation and trial. She cared for them, loved them and provided for them, during the period of temporary custody as she had in the past. The children should have remained with April Watkins, and she should have been awarded custody because it is in the children's best interest to remain with their mother.

"State statutes, appellate court determinations, rules of court, and professional standards regarding child custody often fail to recognize and address assumptions, beliefs, and practices that discriminate against parents with disabilities. Although the type of a parent's disability (e.g., physical versus psychiatric) may influence the degree to which inaccurate and bias-driven notions about disability and parenting hold sway, the overall approach to parents with disabilities fails to reflect the reality that a person's disability, in itself, provides little or no information about that person's parenting capacities." (Kirshbaum, Megan, Ph.D., Daniel O. Taube, J.D., Ph.D., and Rosalinda Lasian Baer, *Parents With Disabilities, Problems in Family Court Practice*, Journal of the Center for Families, Children & The Courts, Vol. 4 (2003) at 27). In the case *In Re Marriage of Carney*, 24 Cal.3d 725, 598 P.2d 36,157 Cal. Rptr. 383, the court stated that when faced with the factor of a parent's disability in a custody matter, "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 to it, and take into account the special contributions the person may make to the family despite, or even because of the handicap." In the above referenced case, the Wife presented evidence and testimony throughout the hearing that the father was confined to his wheelchair and was incapable of feeding and taking care of himself much less helping the children prepare meals, get dressed or any other necessary parental duties. The trial Judge based the majority

of his line of questioning on the father's disability and virtually all of his questions to each and every witness revolved around his handicap and its physical consequences real or imagined. The actual facts were such that:

> neither of the children appeared threatened by William's physical condition; the condition did not in any way hinder William's ability to be a father to them, and would not be a detriment to them if they remained in his home; the present family situation in his home was a healthy environment for the children; and even if Lori were to leave, William could still fulfill his functions as a father with appropriate domestic help.

The Court therefore held that "the father's physical handicap, which affected his ability to participate with his children in purely physical activities, did not constitute a changed circumstance of sufficient relevance and materiality to render it either "essential or expedient" for their welfare that they be taken from his custody."

In a similar case, *In Re Marriage of Levin* (1980, 2d Dist) 102 Cal App 3d 981, 162 Cal Rptr 757, the Court held that "the physically handicapped mother of a 5-year-old child was entitled to a new custody hearing since the trial court had based its award of permanent custody to the father on the limitations that the mother's handicap would impose on what the trial court considered to be the most normal possible life for the child". The trial court in 1980 wrongly based its final decision on the mother's limitations due to being essentially confined to a wheelchair as a result of a stroke. Mrs. Levin was generally confined to a wheelchair, but, much like April in this case, she could walk a few hundred feet by herself. Also, much like April, she permanently lost much of her vision in her right eye. The child custody portion of the *Levin* case was reversed.

Very similar to the individuals in the cases above, April Watkins has a physical disability that requires the use of a wheelchair and prevents her from driving at this time; however, this handicap by no means should define her parenting skills, ability to love her children, nurture her children or physically care for them. The Court must look to the polestar consideration as the best interest of the child and if the condition of the parent will have a substantial and lasting adverse effect on the child's

best interest. The Court is "called upon to resolve an apparent conflict between two strong public policies: the requirement that a custody award serve the best interests of the child, and the moral and legal obligation of society to respect the civil rights of its physically handicapped members, including their right not to be deprived of their children because of their disability". *In Re Marriage of Levin* (1980, 2d Dist) 102 Cal. App. 3d 981, 162 Cal. Rptr. 757.

April's mother, Laura Michael testified at the hearing in this matter that "When April first had her accident, I never saw here cry except one time . . .You know, that's just April, but as far as –April has optic nerve damage, and that's really the only thing that she can't do is drive. It's quite amazing the way she keeps her home, you know. It's just beautiful, and she keeps her home so clean and keeps the children clean. She's a good mom". (T. 295, R.E. 130). April's father, Ricky Michael, testified when asked who appeared to be the primary caretaker for these children, "Well, it would be their mama, April, of course. If they wanted a drink of water, if they cut their finger, or skinned their knee, or whatever...". (T. 404, R.E. 133). April testified at the hearing that after she had her children she was the one who took care of the children on a daily basis (T. 23, R.E. 112). They were living in Florence, Alabama when the kids were born and lived there for a year and a half before moving to Corinth, Mississippi. (T. 23, R.E. 112) There were no family members in the immediate vicinity of their home, and April was the one at home taking care of the children. There was no evidence presented at the hearing contrary to the facts that from the time they were born, April stayed at home with the children and was their primary caretaker in the home. April also testified as a result of the car accident she uses a wheelchair as an incomplete paraplegic and suffers from an optic nerve condition which affects her eyesight but testified that she can walk and/or stand for short periods of time with the assistance of a walker or other object to hold on to, but because of her eyesight is unable to drive (T 21, R.E. 110). She testified that she can see well enough to read to the kids and can read even better with a magnifying glass. April can do everything as far as taking care of her kids and cleaning her

house. (T. 77, R.E. 115).

April Rae Watkins, (Jeremy's sister and hereinafter referred to as April Rae), testified that April basically wanted to stay home and have her (April Rae) take pictures of all the many events that the children had while they were living in Corinth. (T. 637, R.E. 136). However, April in turn testified that she only missed one activity or party that she could remember and it was only because the field trip location, a pumpkin patch, was not wheelchair accessible. April Rae also testified that April frequently called her and stated that she needed a break and to go ahead and take the kids. To this allegation, April testified that while it was true that her kids did visit with their grandparents and aunt a good bit, it was not because she called them stating she needed a break or that she could not handle the kids. She stated, "a lot of that was them calling me, can I take them here, hey, I'm going here, can they go with me, and they would get mad if I ever said no to them. They would get mad, and I didn't feel like it was right to punish my kids just because I wasn't able to go and take them places. I let them go. I let them go." (T. 638, R.E. 137). In the court's child custody determination, there was quite a bit of inquiry into how April could or could not provide for her children and more specifically their transportation needs; however, she was penalized in the Final Judgment for allowing and accepting voluntary help on a regular basis as some sort of relinquishment of her parental duties.

Pursuant to an Agreed Temporary Judgment, April was given temporary custody of the minor children and at the time of the final hearing in this matter was living in Lawrenceburg, Tennessee with her two (2) children, Xander and Kelsi. April had temporary custody of the minor children for approximately eleven (11) months from the time of separation to the hearing. April has a three bedroom, two full bath duplex. The home is perfect to accommodate the needs of April and her children and is very accessible for her wheelchair. (T. 77, R.E. 115). The kids were in first grade and kindergarten at the time of the hearing in this matter and both children were doing very well in school (T. 78, R.E. 116). April testified that the children are very active. They have many neighborhood

friends that they play with out in her yard pretty much every day unless it is raining. (T. 89, R.E. 119). April testified that it is more difficult to sign the children up for extracurricular activities because they were out of town every other weekend for visitation with Jeremy. (T.89, R.E. 119). She was going to sign Xander up for baseball but as many of the games and practices are on the weekend, he would missing a lot of games (T. 89, R.E. 119). In fact, the baseball park is across the street from April's home and April could take them to all games and practices. During the eleven (11) months that April had custody of the children since the separation, there was not one (1) time or situation where the fact that April could not drive caused a situation that endangered the children or adversely affected the children as a result of said inability to drive. (T. 81, R.E. 118)

A guardian ad litem was appointed in this case, and she presented the court with an interim report. Said report outlined the *Albright* factors, however, her report should not have been considered in this regard as she was appointed **only** to make a recommendation as to contact with the paternal grandparents. The only information that the Judge should have considered when analyzing the *Albright* factors and Jeremy and April's parenting skills should have been evidence and testimony presented at the hearing. Therefore, any misappropriation of reliance on the guardian ad litem's report as to her analysis of the *Albright* factors should be an error on the lower court's part. *Albright v. Albright*, 437 So.2d 1003 (Miss.1983).

The *Albright* factors used to determine child custody based on the best interests of the child include: (1) age, health and sex of the child; (2) determination of the parent that had the continuity of care prior to the separation; (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) physical and mental health and age of the parents; (6) emotional ties of parent and child; (7) moral fitness of parents; (8) the home, school and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) stability of home

environment and employment of each parent; and (11) other factors relevant to the parent-child relationship. *Id.*

In making such a determination of child custody, the lower court failed to make a proper *Albright* determination. Where a chancellor improperly considers and applies the *Albright* factors to determine the best interest of the child in a custody proceeding, an appellate court must find the chancellor in error. *Bradley v. Jones*, 949 So.2d 802 (Miss.App. 2006). Therefore, for the above reasons the trial court erred in its determination of child custody in this matter.

In her Motion for Reconsideration, April contended that she was penalized for being disabled when the uncontradicted evidence showed that her disability never jeopardized the safety of the parties' children. (R. 216, R.E. 101). However, in the Final Judgment, the Judge stated that:

> This Court did not penalize the Plaintiff for being disabled, but recognized an infirmity that existed at the time of the marriage of the parties and of the birth of their children, which the Plaintiff acknowledged herself, testifying that she could not drive the children and had to rely on others to do so. To have turned away from this evidence would have been detrimental to the best interests of the children in the Court's reaching its final determination. There has been no denial of the Constitutional rights of due process and equal protection of the laws under both the United States and the Mississippi Constitutions in taking this matter into consideration, when the Plaintiff put this matter before the Court as a matter of evidence, and the Court had not choice but to consider it, because the health of each of the parties is one of the *Albright* factors this Court must consider.

The court states that April was not penalized for her disability; however, it was brought up in the court's analysis of the *Albright* factors under more than one factor rather than merely the one which discussed the health of the parents. Further, as the evidence proved that her ability to drive did not affect her parenting skills, the fact that April can not drive should not have been to her detriment. Despite the fact that the court stated that the Plaintiff was not penalized for her disability, the outcome of the hearing was to the contrary.

2. The Court gave improper consideration of alleged abuse by the paternal grandfather when determining primary physical custody of the minor children by disregarding compelling evidence of abuse and finding that no sexual abuse occurred.

Prior to the divorce proceedings, there were two (2) disclosures regarding alleged incidents of sexual abuse concerning the parties' minor child, Kelsi Dawn Watkins, by her paternal grandfather, Ralph Watkins. There was testimony to this subject by several family members, DHS investigators as well as a court appointed guardian ad litem who subsequently filed an initial report and supplemental report. The first disclosure of abuse was shortly before Kelsi's second birthday in 2005, Kelsi disclosed to Laura Michael that her Pops touches her pee pee. Laura was changing Kelsi's diaper when she told her that "this is your pee pee and no one is supposed to ever touch you down there, and if they ever do, just tell Nana, and Nana will get them." Laura testified that after she said this, Kelsi replied, "Pops does". Pops is Kelsi and Xander's paternal grandfather, Ralph Watkins. Laura went on to testify that Kelsi demonstrated for her what Pops does by taking her index finger and putting her finger in her vaginal area, picking up her finger, and stating "Pops does this" and puts her finger in her mouth. (T. 302, R.E. 131).

The allegations resurfaced in December of 2007 when Kelsi disclosed to April that Pops touches her all the time and again demonstrating by putting her hand on her pee pee and rubbing it. April testified that she asked Kelsi what she says when he does this and Kelsi stated "I say quit doing that but he doesn't quit because he just loves doing it". It was after the second disclosure in December of 2007 when DHS formally opened up a case in this matter. (T. 102, R.E. 121).

The statement that was taken in the initial investigative report by DHS and noted in their file dated December 13, 2007 was as follows:

> R ("Reporter") stated that Ralph Watkins has inappropriately touched Kelsi in her vagina and rubbed it. Kelsi told her mother Monday that her grandfather had done this. R stated that this same incident came up 2 yrs. Ago but it was not documented.

> Mr. Watkins was confronted by Kelsi's parents but he got mad and denied the allegations at that time.

In that investigative report, there was a safety plan in place that stated that "the parents will be protective of Kelsi and Alexander ("Xander") by not allowing the children to be around the alleged perp at least until an investigation is complete". (Ex. 90-94, R.E. 138-142).

On December 14, 2007, DHS Social Worker, Sarah Hall, met with Kelsi at her parents' home. Her notes indicate that Kelsi is a very smart little girl and was very talkative. There were no questions regarding the alleged sexual abuse so as not to interfere with the future forensic interview. (Ex. 96, R.E. 143).

On December 18, 2007 a forensic interview was conducted by Jill Franks. Ms. Franks completed her interview using the RATAC model and began her interview with basic conversation regarding Kelsi's name, age, birthday etc. Kelsi identified the drawing of a girl and the following parts of the body: hair, mouth, boobie, arm, belly, hand, pee pee, leg, feet, head, back, arm, butt, knee and leg. She identified the drawing of a boy in a similar fashion. Ms. Franks went on to speak with Kelsi about hugs and touches that she did not like. (Ex.96, R.E. 143).

> SW ("Social Worker") asked Kelsi if she's ever gotten any other touches she doesn't like. Kelsi said that Pops touches her pee-pee sometimes. SW asked who Pops is. Kelsi said Pops and Gan Gan live across the road...by Jonathon. Kelsi said she and Xander go to visit Pops and Gan Gan. SW asked Kelsi if Pops has touched her pee-pee one time, more than one time or something else. Kelsi said Pops has touched her pee-pee more than one time. SW asked Kelsi if she remembered the last time Pops touched her pee-pee. Kelsi said yes. SW asked her where she was at the last time Pops touched her pee-pee. Kelsi said they were in the den at Pops and Gan Gan's. Kelsi said Gan Gan was sitting in the chair beside the couch and she and Pops were sitting on the couch. Kelsi said Gan Gan was asleep in the chair and Pops touched (Kelsi's) pee-pee with his hand. Kelsi said she told Pops to stop but he didn't. SW asked if it was dark outside, light outside or something else. Kelsi said it was light outside. Kelsi said she'd been at school then home earlier that day. Kelsi said Xander was already in the bed asleep but (Kelsi) wasn't sleepy so she was watching tv. Rosie, (Jenny's mother) was going to pick Kelsi up later on. Kelsi said Pops was wearing his pajamas when he touched her. Kelsi had on a white t-shirt, pants and tennis shoes. Kelsi said Pops touched her pee with his hand. Kelsi told Pops to wash

his hands but he didn't listen. Kelsi said that Pop's doesn't really listen very much. Kelsi said Pops doesn't even listen to Gan Gan. SW asked Kelsi if Pops touched her pee-pee outside her pants, inside her pants or something else. Kelsi said Pops touched her pee-pee inside her pants, under her panties and felt in her pee-pee. SW asked Kelsi if anyone saw Pops touch her pee-pee. Kelsi said no, Gan Gan was asleep. SW asked what happened after Pops touched her pee-pee. Kelsi said Pops got tired and went to sleep. SW asked Kelsi if Pops said anything when he touched her pee-pee. Kelsi said no. SW asked Kelsi if she ever told anybody about Pops touching her pee-pee. Kelsi said she told Momma about Pops touching her pee-pee. Kelsi told SW Pop's touched her pee-pee more than one time. She said they were always in the den inside Pop's and Gan Gan's house when he did it. SW asked Kelsi if she ever saw Pops touch anyone else. Kelsi said no. SW asked Kelsi if Pops touched her anywhere besides her pee-pee. Kelsi said Pops would touch her inside her butt at the same time he touched her pee-pee Kelsi quickly demonstrated, to SW, how Pops would use one hand to touch her pee-pee and the other to touch her butt. Kelsi said Pops touches her all over sometimes. Kelsi motioned to her arm, leg, foot, etc. Kelsi again confirmed that Pops has touched her pee-pee more than one time. Kelsi said they're always in the den when Pops has touched her and sometimes Gan Gan was not there. SW asked Kelsi if anything was different the times Pops touched her when Gan Gan wasn't there. Kelsi said no, nothing was different. Kelsi told SW she and Xander do spend the night with Gan Gan and Pops sometimes. SW asked where they sleep. Kelsi said she, Xander and Gan Gan sleep in Gan Gan's bed. Kelsi said Pops sleeps down the hallway in his bedroom. SW closed the interview by telling Kelsi she did the right thing by telling her mom. SW asked Kelsi what she can do if anything ever happens again and/or if anyone makes her feel uncomfortable. Kelsi said she can tell them "No. Stop." SW told Kelsi she was right but to remember it's also important that she tell an adult. SW asked who are some adults that Kelsi can tell. Kelsi named Mommy, Daddy, Xander, Rosie, a teacher, etc. SW thanked Kelsi for talking to her. (Ex. 96, R.E. 143).

Jill Franks also conducted a forensic interview on Xander Watkins. Xander did not indicate that he had ever been given any bad touches on his pee-pee or booty. He told Ms. Franks that no one should touch your pee-pee or booty. "He told SW Franks that he had been told that Kelsi had been touched by Pops. SW Franks asked who told him that and he stated that Kelsi told him that Pops had touched her. He said that she told him not long ago and they were at home when Kelsi told him. Alexander stated that he has never seen Pops touch Kelsi inappropriately or touch anyone else inappropriately." (Ex. 99, R.E. 146).

On December 20, 2007, after Xander's forensic interview, the social workers along with Detective Rogers and Detective Anderson talked about the case. It was decided that Detective Rogers would contact Ralph Watkins about a polygraph test since Mr. Watkins had stated that he would take one. It was also discussed whether or not everyone thought Kelsi should undergo a forensic exam since she did state that his fingers went inside her body. It was agreed that a forensic exam should be scheduled at the Memphis Sexual Assault Center. (Ex. 97-98, R.E. 144-145).

On December 21, 2007, Kelsi's father, Jeremy Watkins, arrived at the DHS office for his appointment with Sarah Hall. Ms. Hall had been called out on an investigation but Jill Franks spoke with Mr. Watkins.

> SW explained that she had been the one to interview both Xander and Kelsi. SW explained what Kelsi and Xander had both disclosed in their interviews. SW, very adamantly, told Mr. Watkins that one of the concerns of DHS is that Xander and Kelsi have no contact with Gan Gan or Pops at this time. SW stated that DHS's primary concern is the safety of the children...SW assured Mr. Watkins that, because of SW's experience she fully believes Kelsi and has absolutely no reason to doubt her. Mr. Watkins told SW that SW doesn't understand the kind of elaborate stories that Kelsi can tell, like one she told him about the 3 bears. SW told Mr. Watkins there's a world of difference in the 3 bears and Kelsi disclosing that Pops has touched her peepee and bootie...At one point in the conversation Mr. Watkins began to leave, voicing his frustrations on his way to the door. He stated, "I've even thought about blowing my brains out."(Ex. 100, R.E. 147).

On December 27, 2007, Detective Jerry Rogers called Sarah Hall regarding the Watkins case. The DHS case notes state:

> Detective Rogers stated that Mr. Watkins has agreed to take a Polygraph as so long as he does not have to pay for it. Det. Rogers stated that Polygraphs are not 100% which is why Polygraphs are not admissible at trial but it is at Grand Jury. Det. Rogers stated that some red flags he saw are that Mr. Watkins is willing to take a Polygraph but not going to pay for it and he was making up excuses as why he might fail it such as him having a pacemaker and a defibulator that might interfere with the results of the test. These all sounded like convenient excuses to Det. Rogers. (Ex. 98, R.E. 145).

On December 28, 2007, a forensic exam was preformed on Kelsi Watkins; however, the exam showed no recent injury observed. (Ex. 111, R.E. 149). However, in her testimony at the hearing, Jill Franks stated that "children so many times, there's not any physical evidence when there's been fondling, because fondling is fondling. It's outside the body" (T. 246, R.E. 129). The mere lack of physical damage is not conclusive proof that there had been no abuse.

On January 9, 2008, Sarah Hall made the following notes in the DHS case file:

> SW Hall finds evidence of sexual abuse based on the statements of the child during the forensic interview. A prevention case should be opened to monitor the safety and well being of the child. SW is concerned that her father is not going to be protective of her because he does not believe the statements that his child has made and he does not believe that his father would do anything sexually inappropriate to Kelsi.(Ex.. 98, R.E. 145).

On April 30, 2008 social worker, Devin Butler met with April Watkins in her home, April's mother, Laura Michael, was also present at this time. Laura talked to Ms. Butler for a long time

> April's mother met with law enforcement in Birmingham, AL, and took a polygraph test and stated that she passed which shows she did not encourage Kelsi to make false allegations. (Ex. 102, R.E. 148).

On May 7, 2009 Jill Franks, the forensic interviewer, testified in court as to her findings in the case involving Kelsi Watkins. Ms. Franks testified that she had extensive training in her field and had been working at the Alcorn County Department of Human Services for a little over seven (7) years. Ms. Franks went into great detail in her testimony as to the procedure for her interviews and more specifically how she followed this procedure with Kelsi. (T. 217, R.E. 122). When asked about a DVD or video of her interview, she stated that it was given to the DA's office and sometimes later on down the road when they don't need the video anymore, it is destroyed. She testified that she thought that may be what happened in this case. (T. 222, R.E. 123). Ms. Franks was asked the following questions in her direct examination at the hearing and gave the following answers

concerning her interview with Kelsi:

> Q. Now, in the process of this interview–interviews of this type, I'll say, do you look for or do you do anything to protect against, I guess, fabrications, inconsistencies or just put up type stories? Is there anything that you can do to try to sort these out from– the weak for the champ, so to speak? A. Well, just from my experience, I try to look for certain things and be aware of certain things. One of those things– or, as you mentioned inconsistencies, which, you know, I've had that happen before. I also look for any details, specific information that the child can give me. The child's body language when they talk with me, the way they respond and move, I guess. Q. Were there any inconsistencies in what– did the child give you anything that was inconsistent? That is, did any of her statements change from time to time during the interview? A. No, sir, she didn't. None of them did. Q. None of the statements. I'm sorry. None of her statements were inconsistent with the other statements? A. Correct... Q. At any time during the interview, did her attitude or demeanor change in any way? A. Not that I recall or documented...Q. What is the significance of all those details that you were trying to get from this child? A. Well, a child four years old doesn't typically have that kind of knowledge. We feel strongly when a child makes a statement to us like that, that they've either seen something inappropriate or that something has happened to them... Q. Were there any indicators that you picked up on, as this went on, that pointed to this being something that she was coached or forced to say? A. No Sir...I believed her and felt like I didn't have a reason not to believe her. (T. 226-229, R.E. 124-127).

Despite all of the testimony within the DHS file and the testimony from the forensic investigator, the court gave primary physical custody to Jeremy Watkins and put no restrictions on the visitation between the children and their paternal grandparents.

Before making his final decision, the Judge had the Guardian Ad Litem, Rhonda N. Allred produce a Supplemental Report to indicate any recommendation that she might have concerning any restrictions on the visitation between Kelsi Watkins and her grandfather, Ralph Watkins.

The Guardian states in the second paragraph of her Supplemental report that:

> the only evidence to support the allegations against Ralph Watkins came from the Plaintiff and her mother and father, Laura and Rick Michael. The Defendant repeatedly did not believe the allegations and both his mother, Darlene Watkins and his father, Ralph Watkins, have repeatedly denied the allegations. (R. 164, R.E. 094).

This statement completely disregards the compelling statement of Kelsi Watkins in her forensic

interview and the testimony of Jill Franks and Sarah Hall which is outlined above. While the Guardian Ad Litem stated that the Defendant repeatedly did not believe the allegations, Jeremy stated in his testimony that "He did not **want** to believe that it occurred.". After the initial allegation, Jeremy half-heartedly participated in the investigation. He had a friend who was a nurse come to their house to examine Kelsi, and he scheduled and attended his appointment with the DHS social worker. To say that Jeremy Watkins repeatedly did not believe the allegations is a false statement as he did take some precautions concerning the protection of the minor children when the allegations first surfaced (Ex. 100, R.E. 147). However, Sarah Hall noted in the case file that she was concerned that Jeremy would not be protective of Kelsi because he did not believe the statements of his child and did not believe his father had done anything inappropriate. (Ex. 98, R.E. 145). There seems to be some discrepancies in Jeremy's testimony and that he was having a difficult time balancing and/or choosing to believe his child or his parent.

The Guardian Ad Litem goes on to state in the second paragraph of her report that Ralph Watkins took a lie detector test and passed it; however, the results of that lie detector test were never produced in the hearing in this matter and do not exist in the court record. (R. 165, R.E. 095). There was testimony in the hearing regarding the allusive lie detector test and mentions of the test throughout the reports. However, the actual test was not ever presented for inspection. This piece of evidence was given an extremely high level of credibility to not have been produced for the court's review. The only thing to substantiate its existence was Ralph Watkins' testimony. Laura Michael testified that she too took a lie detector test which proved that the allegations that she coached Kelsi into making the disclosures about the abuse were completely false. Her statements were completely ignored by the court. Instead, the close relationship that Laura Michael has with her daughter and her active involvement in protecting her grandchildren were used against April by

the Judge in his analysis of the *Albright* factors. In paragraph six (6) of the Guardian's report, she again references the fact that "Ralph Watkins took and passed a lie detector test and was not indicted by the grand jury. It is important to note that the Grand Jury had the benefit of the video of Kelsi's forensic interview by DHS." (R. 166, R.E. 096). When asked about the video at the hearing in this matter, there was only speculation that the video had been destroyed. The court erred in placing credibility in evidence that was not submitted at the hearing in this matter and merely by the testimony of the accused.

The supervised meeting between Ralph Watkins and his grandchildren on May 7, 2009 was an important consideration in the Guardian's report. That meeting took place in the Judge's chambers at the Alcorn County Chancery Building. The Guardian observed a very affectionate reunion between the children and their grandfather. She reports that they were not shy or hesitant at all. As to this reaction and the assumption that the Guardian made, Jill Franks was also asked in her cross examination about Kelsi's reaction to her grandfather. Ms. Franks was asked the following question and made this response:

> Q. Would you attach any great significance to what might occur in the interaction between this child, Kelsi , and that grandfather? A. I would be interested in any reaction that came, but in keeping an open mind, I understand that children that have been abused may react maybe very loving. It just– react totally opposite of how a person might think. You know, I feel like most people think that children will shun away from people that have abused them, and that is true, sometimes happens, but then there's also a lot of times that children are drawn to a person that abuses them. So, I mean, I don't really know how to answer that question. It would be interesting to observe, but I don't know– I don't feel– I don't feel like – I wouldn't feel comfortable in making any kind of conclusion from–

At this point in Ms. Frank's testimony, counsel opposite objected to her opinion stating she was not a licensed psychologist or psychiatrist; however, the court put much credence in the Guardian Ad Litem's report in which she analyzed the children's reactions to their grandfather as an indicator that there was no abuse. (T. 233, R.E. 128). While the Guardian may have training on issues concerning

children in our legal system, this is no match for the educational experience of a trained psychologist or psychiatrist who specializes in children's issues as was even pointed out by counsel opposite.

In paragraph eight (8) of her report, the Guardian states her findings as follows:

> Based on my interviews, the testimony at trial along with the documentary proof, the above visit and most importantly, the record as a whole, it is my opinion that Ralph Watkins is not a threat to these children and my recommendation is that they should be able to be around him and visit with him. However, due to the nature of the allegations, and out of an abundance of caution, more so because of the length of time since the children, especially Kelsi has had any contact with her grandfather, it is my opinion that it is in her best interest that his visitation with her be restricted, at this time, in that he not be allowed to be in the presence of her alone. I am concerned about the mixed message Kelsi would get from going from no contact to uninhibited contact immediately. As they are able to restore their relationship and any confusion she might feel with the whole situation disperses, this restriction could be removed if the Court see fit. (R. 167, R.E. 097).

The court took the report of the Guardian Ad Litem and despite the fact that the Guardian found that it was in the children's best interest to have restricted visitation with their grandfather, he stated in his Order that "No restrictions should be placed upon contact with the children's paternal Grandparents, Ralph and Darlene Watkins..." and gave primary physical custody to Jeremy Watkins.

There was substantial evidence found by investigating authorities that Kelsi had been sexually abused by Ralph Watkins. The Chancellor chose to ignore these findings when he granted primary physical custody to Jeremy and gave Ralph Watkins unlimited access to Kelsi, all of which is an egregious error and abuse of discretion.

In her Motion for Reconsideration, it was pointed out that the court made two (2) findings which were totally unfounded and were contradicted by the evidence presented at trial. The first finding being that no abuse occurred and second that Kelsi Watkins had been injured in some fashion by the investigations of those allegations. (R. 216, R.E. 101). In the Final Judgment, the court stated that:

> This Court did in fact find there was no credible evidence of sexual abuse on the part of Ralph Watkins, the paternal grandfather, and such evidence as it was, this Court, as a matter of fact, has found was not credible, which is why this Court did not and does not want the child, Kelsi Watkins injured or damaged by continued questioning and harping about the matter hereafter. (R. 237, R.E. 040).

Had the court given proper credence to the testimony of Jill Franks, the forensic interviewer and DHS employee, as well as all of the other corroborating testimony presented by April Watkins, it would have been virtually impossible for the court to have made the above findings of fact. As to the testimony of Jill Franks, the court stated in the Final Judgment that "Jill Franks had her own conclusion as to whether there was coaching or other outside influence on Kelsi, but the undersigned Chancellor is the finder of fact in this case..."

In *R.L.N. v. C.P.N.*, So.2d 620, (Miss. App., 2005), the Mississippi Court of Appeals reviewed a Madison County Chancery Court decision wherein the Chancellor ordered R.L.N. (the father) to cease all visitation with his son based on the court's finding that R.L.N. had sexually molested him. Aggrieved, R.L.N raised the following issues on appeal:

> I. Did the Chancellor err in placing the burden on the father, accused of sexually abusing his four year old son, to prove his innocence before ending four years of strict supervised visitation, where a D.H.S. investigation and two independent psychologists did not confirm abuse?
>
> II. Did the Chancellor commit manifest error in determining that a four year old child had been the victim of sexual abuse committed by his father, when the child made inconsistent statements about whether he was abused during the first two years of the investigation, but after four years of almost continual examination the child began to "remember" additional episodes of abuse by his father from years earlier?...
>
> III. Did the chancellor commit manifest error in suspending all visitation of the father with his minor son, where the expert testimony was that the child will be harmed by the suspension of visitation and that in all probability the child will not be harmed by expanding visitation with the father?

The Court of Appeals held that (1) the chancellor did not place the burden on the father to prove his innocence from allegations that he sexually assaulted his son; (2) evidence was sufficient to find that child had been sexually abused by his father; and (3) evidence established that suspension of all

visitation between the father and son was in child's best interest. The most compelling portion of the Court of Appeal's opinion and most relevant comparison to the case at hand arose out of the second issue concerning the lower court's determination that B.N. had been sexually abused. It is this same issue whether or not Kelsi Watkins was sexually abused, that became the focal point of the entire hearing and the *Albright* analysis resulting in Jeremy Watkins being awarded primary physical custody of the minor children. *Albright v. Albright*, 437 So.2d 1003 (Miss.1983).

In *R.L.N. v. C.P.N.*, the facts were as follows:

> B.N.'s parents had been divorced for about six months when B.N. began exhibiting very disturbing behavior at daycare. His teachers observed that B.N. displayed extremely aggressive behavior, usually with little or no provocation. In addition to violent behavior, B.N. also frequently exhibited advanced sexual knowledge. B. N. was expelled from one daycare for such misconduct, including exploring little girls' bodies in a way that teachers described as unusual for a child of his age. After these reports, C.P.N. began taking B.N. to see Dr. Angela Herzog, a psychologist appointed by the court during the couple's divorce.
> While enrolled in a second daycare, B.N.'s teacher saw him on the playground kneeling next to a little girl who was lying on her stomach with her panties down while B.N. fondled her buttocks with his finger. When asked by the teacher about the incident, B.N. responded that his father put pencils in his "hiney." The teacher testified that she had several conversations with B.N. about his father, and B.N. mentioned the pencil incident three or four times. She also asked B.N. if he could describe how his dad hurt him, to which he got on all fours and stuck his bottom up. Other teachers also testified about B.N.'s behavioral problems.
> In November of 2000, Dr. Herzog contacted the Department of Human Services (DHS) to investigate possible sexual abuse. DHS reported that they were unable to find any signs of sexual abuse. Dr. Herzog also told C.P.N. that she wanted her to take B.N. to Dr. Meeks for a physical examination. While DHS found no signs of abuse, Dr. Meeks' report suggested that although there was no tearing, it appeared that B.N. may have become desensitized in the area of his anus. However, Herzog ultimately concluded that she was uncertain as to whether B.N. had been sexually abused...the guardian ad litem declined to give a recommendation to the court regarding visitation. She stated her belief that something terrible had happened to B.N. but that she was not convinced that his father was the perpetrator...R.L.N.'s relatives testified favorably for R.L.N., while C.P.N.'s sister testified that she believed R.L.N. had molested B.N. Most disturbing was the sister's testimony in which she recounted something B.N. cried out in his sleep one night while he was staying with her; "please stop. It's uncomfortable. I don't like it...Please, take it out. It hurts. It hurts."...Paul Davey, a child therapist who began counseling B.N. in 2002, testified that he believed that B.N. had been sexually abused by his father...Dr.

> Herzog testified that she questioned the veracity of B.N.'s accusations regarding the "pencil in the hiney" allegation, Dr. Herzog said that at one point B.N. told her that his mom told him to say that. Another time, B.N. told Dr. Herzog that his uncle told him to say that...Dr. Herzog's ultimate conclusion was that she could not be certain that B.N. had even been sexually abused, much less by his father. Rather, she attributed B.N.'s behavior to the "messy divorce." Dr. Herzog also testified that she believed that B.N. may be genetically predisposed to psychological difficulties...Davey testified that he believed that B.N. had been sexually abused, and he believed that B.N.'s father was his abuser. His main concern was that B.N. had repeatedly named his father, and no one else, as his abuser and would not recant the allegation...On cross-examination Davey testified that during their first meeting B.N. told him that he had made up the stories about his father. Also, B.N. made no allegations to Davey that had not been reported to teachers or other counselors...Davey opined that the inconsistencies were due to B.N.'s age and lack of vocabulary at the time he was evaluated by other practitioners...Davey was also asked if it was possible that B.N.'s memories of abuse could be the result of years of questioning about his father and about his sexual behavior along with B.N.'s observations of the extremely restricted visitation. Davey said that it was possible but in his opinion unlikely that these were false memories. *R.L.N. v. C.P.N.*, So.2d 620, (Miss. App., 2005).

The Court of Appeals found that:

> Certainly the chancellor's finding that B.N. had been sexually abused by R.L.N. was based on more than a "mere scintilla" of evidence. We must note that while R.L.N. points to inconsistencies in B.N.'s allegations, B.N. has never named another person as his abuser. During four years of hearings and examinations, no one else has been implicated as sexually abusing B.N. Therefore we cannot find that the chancellor's finding was based on insufficient credible evidence or that the chancellor was manifestly wrong. *R.L.N. v. C.P.N.*, So.2d 620, (Miss. App., 2005).

Much like the case at hand, *R.L.N. v. C.P.N.*, the testimony at the hearing concerning the abuse was conflicting between certain sources. The cases were also similar in that at some point or another the abused child stated they had made up the allegation or it was alleged that someone told them to say that they were abused. However, in this case, Kelsi's story never changed and DHS reports confirmed that Kelsi was telling the truth and somehow all of the evidence that corroborated Kelsi's statements were not enough for the court to establish that she was sexually abused. Had the court used the appropriate standard as did the court in *R.L.N. v. C.P.N.*, the outcome of primary

physical custody and visitation would have most certainly had a different outcome and as such should have been awarded to April.

The *Albright* factors used to determine child custody based on the best interests of the child include: (1) age, health and sex of the child; (2) determination of the parent that had the continuity of care prior to the separation; (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) physical and mental health and age of the parents; (6) emotional ties of parent and child; (7) moral fitness of parents; (8) the home, school and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) stability of home environment and employment of each parent; and (11) other factors relevant to the parent-child relationship. *Id.*

In making such a determination of child custody, the lower court failed to make a proper *Albright* determination and the court erred in placing primary physical custody of the children with Jeremy Watkins. Where a chancellor improperly considers and applies the *Albright* factors to determine the best interest of the child in a custody proceeding, an appellate court must find the chancellor in error. *Bradley v. Jones*, 949 So.2d 802 (Miss.App. 2006).

C. The Chancellor erred as a matter of law in failing to make appropriate findings as to each factor under *Albright*, the Chancellor's decision should be reversed.

Before the court began its analysis of custody, the court addressed the child abuse allegations and found as follows: "The burden of proof is upon the proponent. By clear and convincing evidence from all evidence in the record, exclusive of both the Guardian Ad Litem Reports, this court finds there is no credible evidence to substantiate sexual abuse of either of the children, Kelsi

Dawn Watkins or Alexander Rafe Watkins by Ralph Watkins..." (R.185, R.E. 009).

The court began its Opinion and Judgment as it pertains to Issue 1. Custody of the Parties' Minor Children by dismissing the testimony that was presented that the Defendant, Jeremy Watkins did perpetrate family violence against the Plaintiff April M. Watkins by grabbing her and bruising her arm, and also by threatening suicide. (R. 186, R.E. 010). The threat to commit suicide is substantiated by a conversation that Jeremy Watkins had with Jill Franks and a notation of this conversation was made in the notes in the DHS file which was made a part of this record. (Ex. 100, R.E. 147). However, the Judge stated in his opinion that:

> This Court finds that there was no serious bodily injury to the Plaintiff April M. Watkins or a pattern of family violence against the party who made the allegation, who is the Plaintiff, so that the presumption that is detrimental to the children and not in the best interests of the children to be placed in the sole custody, joint legal custody or joint physical custody of a parent (here the Defendant) who has a history of perpetrating violence is not triggered. (R. 186, R.E. 010).

Therefore any violent act towards April or the suicide threat was not a consideration of the court when making a decision on the custody of the parties' children. The court continued on with its analysis of the *Albright* factors as follows:

(1) AGE OF THE CHILDREN: As the children were six (6) and seven (7) at the time of the hearing, the court stated that this factor favored neither party. (R. 186, R.E. 010)

(2) HEALTH AND SEX OF THE CHILDREN: The court found this factor to favor Jeremy Watkins on the basis that:

> the continued attention that Kelsi Dawn Watkins has received concerning the alleged and unproven claims of her sexual abuse by Ralph Watkins can be nothing but harmful to her. As Kelsi Dawn Watkins has had these claims brought to her by her Mother, the Plaintiff April M. Watkins, and/or her maternal Grandmother Laura Michael, and not the Defendant, Jeremy R. Watkins. (R. 187, R.E. 011).

The court continues to punish the Plaintiff for believing in her daughter's statement that she had been sexually abused, statements that she took very seriously and reported to DHS. DHS took those statements by Kelsi and as mentioned in the argument above found that Kelsi was telling the truth and was not coached in her disclosures to the forensic interviewer. If the above factor should favor either party, it should favor the Plaintiff, April Watkins who has always had her daughter's best interest, health and safety in mind. Instead, the court favored the Defendant who only half-heartedly participated in the DHS investigation and seemed to place more energy into defending his father rather than defending his daughter.

In her Motion for Reconsideration, April points out the fact that the court "on several occasions, found fault with the Plaintiff for pursuing the sexual abuse allegations with "no credible evidence to back them," in essence punishing the Plaintiff for believing her daughter". (R. 217, R.E. 102). In the Final Judgment, the court stated in response to this statement that "It is not the intent of this Court to punish the Plaintiff for believing her daughter, but it is the duty of this Court to make findings on the factual evidence presented to it...". While the court states that it is not the intent to punish the Plaintiff for believing her daughter, they in turn found this factor to be in favor of Jeremy on the sole basis that April pursued Kelsi's sexual abuse allegations. (R. 238. R.E. 041).

(3) CONTINUITY OF CARE PRIOR TO THE SEPARATION: The court found this factor to favor neither party due to the fact that:

> the testimony was clear that the paternal Grandparents of the children and the maternal Grandmother of the Plaintiff were significant caretakers of the children prior to the parties' separation, and that on most weekends and a significant portion of each week, the paternal Grandparents, after the parties had moved to Alcorn County, Mississippi, had kept the children, and before the maternal Grandmother of the children had sone so. (R. 187, R.E. 011)

April Watkins testified that she was the one who took care of the children and stayed at home with

the children during the day when her husband was working up to sixty (60) hours per week. (T. 24, R.E. 113) April does not work and was and is able to stay with the children whenever they are not in school. April was also the one who was given temporary custody of the minor children and had continuity of care for approximately eleven (11) months while this case was moving forward. April testified that while it was true that her kids did visit with their grandparents and aunt a good bit, it was not because she called them stating she needed a break or that she could not handle the kids. She stated, "a lot of that was them calling me, can I take them here, hey, I'm going here, can they go with me, and they would get mad if I ever said no to them. They would get mad, and I didn't feel like it was right to punish my kids just because I wasn't able to go and take them places. I let them go. I let them go." (T. 638, R.E. 137). The Chancellor unfairly left the factor or Continuity of Care in favor of neither party when it was clear that April Watkins has had continuity of care of the parties' minor children from the time they were born and throughout the hearing in this matter.

In her Motion for Reconsideration, April states that "the Court has erroneously considered surrogate care for the children by the Defendant's family as the Defendant's contribution to the continuity of care. Despite the testimony from April and her parents regarding April's duties and responsibilities as the primary caregiver to the children, the court responded "It is the Court's finding of fact that in the early years of the parties' marriage, neither of the parties paid full attention to the children...The Court did not consider surrogate care for the children by the Defendant's family as the contribution to the continuity of care, but as the lack of care by the Plaintiff, who insisted upon it". (R. 239, R.E. 042).

(4) THE BEST PARENTING SKILLS AND WILLINGNESS AND CAPACITY TO PROVIDE PRIMARY CHILDCARE: The court found this factor in favor of the Defendant and again unfairly used the Plaintiff's pursuit of the DHS sexual abuse case and her handicap as strike

against her parenting skills. (R. 187, 188, R.E. 011-012). Ricky and Laura Michael testified to the parenting skills of April and that they had personal knowledge that April was the parent who did the majority of the parenting while Jeremy worked. The court goes on to bring up the fact that April has refused to enroll the children in extra-curricular activities; however, April testified that she had in fact had looked in to signing Xander up for baseball but as many of the games and practices are on the weekend, he would missing a lot of games. (T. 89, R.E. 119). In fact, the baseball park is across the street from April's home, and April would be able to take them to all games and practices. April also testified that the only activity that she was aware that Jeremy had the children enrolled in was 4-H. The court erred in finding this factor in favor of Jeremy and in turn should have favored April.

(5) EMPLOYMENT OF THE PARENTS AND RESPONSIBILITIES OF THAT EMPLOYMENT: The court found this factor to be in favor of the Defendant despite the fact that his work history shows that his long hours and his employment has kept him from the children. (R. 188, R.E. 012). The court based this factor on mere speculation that his employment could be modified to allow him more time with the children. While April is not currently employed, she does draw a disability and support check. She is available for the children at all times they are around her. This factor should have favored April.

(6) PHYSICAL AND MENTAL HEALTH AND AGE OF THE PARENTS: the court found this factor to be in favor of the Defendant. (R. 188, R.E. 012). Again, the court put much emphasis on April's limitations due to her disability and neglected to focus on what she has been doing for the kids for all of their lives and the lack of evidence given to prove that April's disability in some way put the children in danger. While the court states that it was not a consideration in determining who this factor should favor, the court goes into a discussion in which it questions April's mental health even though April's mental health was never a subject of any testimony or evidence in the hearing.

The court stated :

> The mental health of both appears to be good, with the slight exception that the Plaintiff April M. Watkins can be, has been and appears likely to be controlled by her Mother Laura Michael on factors concerning the minor children, which has been a significant factor in the death of the parties' marriage and a proximate cause of the litigation herein; whether that is a mental health problem or not has not been diagnosed or proven. (R. 188, R.E. 012).

The court admits in its own statement that a diagnosis of mental problem had not been proven; however, the court continued on to inappropriately include unsubstantiated facts in its ruling as well as stating that it was this undiagnosed mental problem that caused the "death" of the marriage. Such a statement is an egregious misstatement by the court. While the court stated it was not a factor that favored either party, one can only infer that it would not have been stated had it not had some impact on the court's determination. As in the previous *Albright* factors that have already been discussed, the court continues to punish the Plaintiff for believing in her daughter's statement that she had been sexually abused, statements that she took very seriously and reported to DHS. This factor should favor neither party.

(7) EMOTIONAL TIES OF THE PARENT AND CHILD: The court found that this factor favors neither party as both parties love both of their children and both of the children loves each parent; however, even the Guardian Ad Litem noted that there is a special bond between Xander and his mother. (R. 189, 152, R.E. 013,082). This factor should slightly favor April.

In her Motion for Reconsideration, April contends that the stronger emotional ties between Xander Watkins and herself were ignored by the court in its determination of this factor. (R. 217, R.E. 102). In response, the court stated that it was not ignored, but considered that it was in the best interest of the children not to separate the siblings. (R. 239, R.E. 042). However, had the court appropriately analyzed the *Albright* factors, April should have received primary physical custody of

the minor children and the issue of separating the siblings would have been moot.

(8) MORAL FITNESS OF PARENTS: The court found that this factor favors April as she is the stronger factor in the children going to church, which the court states is a moral builder. Likewise the court was appropriate in their determination of this factor. (R. 189, R.E. 013).

(9) HOME, SCHOOL AND COMMUNITY RECORD OF THE CHILDREN: The court found this factor in favor of Jeremy. The court states as follows:

> The school attendance and grades of the children in Lawrenceburg, Tennessee, have been good, but their ability to expand through school and other extra-curricular activities is significantly impaired by the lack of ability to transport them or to attend events with them by the Plaintiff April M. Watkins, who has clearly shown a willingness not to enroll the children in such activities out of an unfounded fear for them and her physical inability to transport them. (R. 189, R.E. 013).

As already stated, the transportation of the children to school events and extracurricular activities is not a problem. April testified that she has multiple family members and friends who are willing and able to assist her in this regard. She also testified as to her willingness to enroll the children in said activities such as baseball. The court's mention of April's unfounded fear for her children is misplaced. After all of the allegations concerning her children and their abuse, the opening of a DHS case and having the case before a grand jury, it is only natural for a mother to become extremely protective of her children and to call such fear unfounded is clearly in error. This factor should favor April as she had the children for approximately eleven (11) months during the divorce proceedings and had established them in a thriving community where they were doing well in school and had many friends.

The above facts concerning the children's community record were emphasized again in April's Motion for Reconsideration; however the court responded:

> April Watkins has not exclusively cared for the children; she has had the help of other family members in caring for the children since she has been gone and has prohibited the children from engaging in extracurricular activities, which helps them grow and mature, which is detrimental to their well-being but it is true that they have otherwise excellent community record as shown by their academic achievements and reports from their teachers in Lawrenceburg, Tennessee. (R. 240, R.E. 043).

The court again is placing the majority of its focus on April's ability to drive and extracurricular activities. April it seems is being punished again for receiving help from family members and friends to assist her in the **one** thing that she is unable to do for her children and that is to drive. By its own admission the court states that the children have excellent school records shown by their academic achievements. The court has thereby placed more emphasis on the children's participation in extracurricular activities than it has on their academic achievements. Much like the name infers, extracurricular activities are important but are an extra activity which the children may participate. The court also falsely accused April of prohibiting the children from participating in extracurricular activities. April is willing and able to enroll the children in extracurricular activities,

(10) PREFERENCE OF THE CHILDREN AT THE AGE SUFFICIENT TO EXPRESS A PREFERENCE BY LAW: The court correctly found this factor in favor of neither party as the children were not of age to express a preference at the time of the hearing. (R. 189, R.E. 013).

(11) STABILITY OF HOME ENVIRONMENT AND EMPLOYMENT OF EACH PARENT: The court found this factor in favor of Jeremy based on the following:

> The Defendant Jeremy R. Watkins has been steady in his employment and stable in his residence since the parties moved from Alabama. The Plaintiff April M. Watkins has moved twice since her separation from the Defendant and is living in a home clearly above her financial means, with no current prospects for employment, but an obvious ability and willingness to learn and advance herself so that she may be employed. (R. 189, 190, R.E. 013, 014).

While April Watkins did move twice since the separation, she was merely doing the best that she could to readjust to her unforseen situation. Her move into her sister's home was temporary while she took some time to find a place that would be accommodating to her and the children. She also testified that she would like to go back to school to take some computer courses and eventually write children's books. (T. 22, R.E. 111). While the court is quick to point out that April is living in a home "clearly above her means", the court fails to consider testimony by Jeremy during the hearing:

> Q. Do you know the amount of the mortgage? A. It's over $70,000. I think it's like, $73,000. Q. Do you have any equity in this home? A. No. Q. Let me ask you this. Are you able to afford this home? A. Not paying what I'm paying out now, no. I mean, I'm having to borrow money, robbing Peter to pay Paul on a lot of my bills. Q. And I believe your parents initially put $8,000 into the home for you to get into the home; is that correct? A. Yes sir. (T. 540, R.E. 135).

In his own testimony Jeremy stated that he could not afford his home and was borrowing money to pay bills; however, the court made no statement regarding his financial instability and in turn found this factor in his favor. The court also gave no consideration to the fact that Jeremy was borrowing money from his family and testimony from Jeremy that his father owned both of Jeremy's cars. (T. 11, R.E. 108). Jeremy's employment had been steady; however, the court failed to consider that the long hours that he puts in for his employer takes away from the time he could be spending with his children and is to their detriment. This factor should not have been found to be in Jeremy's favor and should have been in favor of April.

(12) OTHER FACTORS RELEVANT TO THE PARENT-CHILD RELATIONSHIP: In the court's analysis of this factor, they note that the "tender age doctrine" would not be a significant factor worthy of weight in determining the best interests of the children in this particular case. However, the court uses this factor to again wrongfully rehash all the allegations that April and her mother were conspiring to thwart Kelsi's healing process by bringing up the subject of sexual abuse

("that this court has found did not occur based upon the lack of credible evidence submitted to the court"). The court goes on to state that the only possible reason that Kelsi would disclose such an allegation on a second occasion would be that it was planted in her mind through her mother by constant instigation of her grandmother. (R. 190, R.E. 014). April and her mother (Laura Michael) both testified that Kelsi disclosed to them that she had been sexually abused, and they were continuously crucified by the court for taking her statements seriously. The court chose to disregard the fact that Laura Michael passed a lie detector test stating that she did not coach Kelsi into making these statements as well as the testimony and evidence from DHS workers and investigators stating that they too felt like Kelsi had been abused and was not coached as to what to say. The court had all the evidence that it needed to make a Judgment based on the *Albright* factors without bringing up issues already discussed in the final factor.

V. CONCLUSION

In the case at hand, the chancellor's findings were not supported by substantial evidence and his discretion was manifestly wrong and clearly erroneous. In making such a determination of child custody, the lower court failed to make a proper *Albright* determination, and the court erred in placing primary physical custody of the children with Jeremy Watkins. On this basis, the lower court's Opinion and Judgment Dated August 14, 2009 and Final Judgment Dated September 21, 2009 awarding Jeremy Watkins primary physical custody of the minor children should be reversed and this Court should render a decision in favor of April Watkins.

VI. STATEMENT REGARDING ORAL ARGUMENT

Oral argument would greatly aid the Court in its analysis of the issues presented in this case. The number and uniqueness of the issues create a need for counsel to give a detailed explanation of the evidence and law related to those issues. Accordingly, the Appellant respectfully requests that the Court grant oral argument in this case.

RESPECTFULLY SUBMITTED, this the 17th day of May, 2010.

APRIL M. WATKINS, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, Amy D. Saling, the undersigned counsel of record for the Appellant, do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct copy of the foregoing Brief of Appellant upon the following:

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SO CERTIFIED, this the 17th day of May, 2010.

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