

**ATTORNEY FOR THE APPELLEE
EDWARD MATTHEW BOYD**

CERTIFICATE OF INTERESTED PERSONS

Case No. 2010-CA-00200

Lisa King Boyd

v.

Edward Matthew Boyd

Pursuant to Rule 28(a)(1) of the Mississippi Appellant Procedures, the undersigned counsel of record certifies that the following listed persons have an interest in the out come of this case. These representations are made in order that the Justices of the Supreme Court are/r the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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|--|--|
| 1. Lisa King Boyd - Appellant
917 Pine Hill Circle
Carthage, MS 39051 | 5. Hon. Johnny Pope, Guardian ad Litem
P. O. Box 329
Carthage, MS 39051 |
| 2. Edward Matthew Boyd - Appellee
280 Barnes Road
Carthage, MS 39051 | 6. Hon. Cynthia Lee Brewer
Eleventh Chancery Court District
P. O. Box 404
Canton, Mississippi 39046 |
| 3. Fair & Mayo, Attorneys - Counsel for Appellant
Hon. James C. Mayo
FAIR & MAYO
P O Box 509
Louisville, Mississippi 39339 | |
| 4. Nettles & Rhea, Attorneys - Counsel for Appellee
Hon. Alan D. Rhea
P. O. Box 148
Carthage, MS 39051 | |

Alan D. Rhea, MSE
Attorney of record for Edward Matthew Boyd,
Appellee

STATEMENT REGARDING ORAL ARGUMENT

That oral argument regarding this matter is not needed due to the fact that the Chancery Court of Leake County, Mississippi, applied the law regarding custody as set forth by the Supreme Court of Mississippi, by the use of the Albright Factors as well as following the recommendation of the Guardian ad Litem in this matter. That the Court was correct in deeming matters admitted that were not timely answered within thirty (30) days as required by Rule 36 M.R.C.P. Therefore, based upon the well stated law of the State of Mississippi, no oral argument is required regarding this matter, in as much as no new legal questions are posed in this matter that have not already been resolved by the Supreme Court of the State of Mississippi.

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STATEMENT REGARDING REFERENCE TO THE PARTIES

That pursuant to Rule 28 M.R.A.P. in the Brief of the Appellee, the Appellee, Edward Matthew Boyd, will be referred to as Edward Matthew Boyd, and the Appellant, Lisa King Boyd, will be referred to as Lisa King Boyd.

STATEMENT OF THE ISSUES

The issues before this Court are 1) whether the Chancery Court of Leake County, Mississippi was correct in deeming matters admitted when the responses to Request for Admissions were not timely filed and some of the Admissions were used as a factor in the custody award; 2) whether the Chancery Court of Leake County, Mississippi erred in granting custody to a parent not selected pursuant to Section 93-11-65 of the Mississippi Code of 1972, by a person over twelve (12) years of age; 3) whether the Chancery Court of Leake County, Mississippi, improperly applied the Albright factors in the award of custody to Edward Matthew Boyd of five of the six children of the Parties; and 4) whether Miss. Code Ann. § 93-5-24 (9) was misinterpreted in the awarding of custody to Edward Matthew Boyd of five (5) of the six (6) children of the Parties.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This matter is an appeal of a Divorce and Custody action from the Chancery Court of Leake County, Mississippi, wherein a Divorce was granted between Edward Matthew Boyd and Lisa King Boyd on the grounds of irreconcilable differences and a trial conducted on the issues of custody and other contested issues.

B. COURSE OF THE PROCEEDINGS

That on or about December 13, 2007, Lisa King Boyd filed a Complaint for Divorce against Edward Matthew Boyd in the Chancery Court of Leake County, Mississippi, being Cause No. CH07-0480.

That on or about December 19, 2007, the Chancery Court of Leake County, Mississippi, entered a Temporary Order in this matter and appointed the Hon. Johnny Pope as Guardian Ad Litem of the six (6) minor children of the parties, namely, Cayla Delaine Boyd, Mariah Daniele Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd.

That on or about April 16, 2008, Edward Matthew Boyd filed his Affirmative Defenses, Answer and Counterclaim in this matter seeking a divorce from Lisa King Boyd and custody of the six (6) minor children of the parties.

That on or about April 16, 2008, Edward Matthew Boyd filed his first set of discovery being Request for Production of Documents, a First Set of Interrogatories and Request for Admissions with the Chancery Court of Leake County, Mississippi, and served same upon Lisa King Boyd.

That approximately six (6) months after Edward Matthew Boyd filed his first set of discovery matters including his Request for Admissions, an Agreed Scheduling Order was entered in this matter on October 1, 2008. That thereafter, on April 1, 2009, a Second Agreed Scheduling Order was entered in this matter. That this Second Scheduling Order was entered approximately one (1) year after discovery was propounded to Lisa King Boyd. The Second Agreed Scheduling Order specifically allowed Lisa King Boyd until April 15, 2009, to Answer the First Set of Interrogatories previously propounded to her. That said Second Scheduling Order did not allow any additional time for Lisa King Boyd to answer the previous Request for Admissions propounded on April 16, 2008, as those admissions were deemed admitted. That the Second Agreed Scheduling Order allowed additional discovery to be submitted to the parties by April 30, 2009. That all responses to the additional discovery were to be answered by the parties by the 1st day of July, 2009.

That the Chancery Court of Leake County, Mississippi, deemed that the Request for Admissions Propounded in this matter on the 16th day of April, 2008, were admitted, and the Chancery Court of Leake County, Mississippi, properly found that Lisa King Boyd did not timely respond to the Request for Admissions as required by Rule 36 M. R. C. P.

That on November 17, 2009, the Chancery Court of Leake County, Mississippi, allowed a Joint Motion to Amend the Complaint for Divorce, to withdraw Affirmative Defenses, Answer and Counterclaim filed, and said Chancery Court granted the Motion on November 17, 2009. On November 17, 2009, a Stipulation of Irreconcilable Differences Divorce was filed in this matter wherein Lisa King Boyd and Edward Matthew Boyd agreed to an Irreconcilable Differences Divorce, that the only issues to be tried by the Chancery Court of Leake County, Mississippi, were as follows:

1. Custody and visitation with the minor children of the parties namely, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, Emily Anna Boyd, Cayla Delaine Boyd, and Mariah Danielle Boyd.

2. Amount of Child Support to be paid by the non-custodial parent.

3. Which party shall claim the children as a tax deduction on their Federal and State income taxes.

4. Which party shall provide a policy of health insurance on the minor children.

5. Which party shall have the exclusive use and ownership of the 1998 Chevrolet Z-71 truck, the 2001 GMC Yukon XL and the 2005 Nissan Centra.

6. Which party shall be responsible for the Guardian Ad Litem fees.

That this matter was tried on November 18th and November 19th, 2009, in the Chancery Court of Leake County, Mississippi, and on January 5, 2010, the Chancery Court of Leake County, Mississippi, entered its opinion and Final Judgment.

C. DISPOSITION OF THE COURT BELOW

On January 5, 2010, the Court entered its Opinion and Final Judgment on the contested matters tried in the Chancery Court of Leake County, Mississippi, and awarded custody of Cayla Delaine Boyd, born June 6, 1990, to Lisa King Boyd; and awarded custody of Mariah Daniele Boyd, born May 11, 1995; Megan Ashley Boyd, born March 20, 1999; Margaret Ellen Recie Boyd, born June 30, 2001; Madeline Lisa Boyd, born June 22, 2003; and Emily Anna Boyd, born June 22, 2003 to Edward Matthew Boyd, and adjudicated the other contested matters as set for in the Stipulation of Irreconcilable Differences Divorce.

D. STATEMENT OF THE FACTS

On December 13, 2007, Lisa King Boyd filed a Complaint for Divorce in the Chancery Court of Leake County, Mississippi, seeking a divorce from Edward Matthew Boyd and custody of the six (6) children of the parties namely, Cayla Delaine Boyd, born June 6, 1990; Mariah Danielle Boyd, born May 11, 1995; Megan Ashley Boyd, born March 20, 1999, Margaret Ellen Recie Boyd, born June 30, 2001; Madeline Lisa Boyd, born June 22, 2003; and Emily Anna Boyd, born June 22, 2003. (Trial Exhibit 2, RE 3,4)

That on December 9, 2007, a Temporary Order was entered in this matter and the Hon. Johnny W. Pope was appointed Guardian Ad Litem for the minor children of the parties, namely Cayla Delaine Boyd, Mariah Danielle Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd. (Trial Exhibit 8, RE 9)

That from December 19, 2007, until the trial of this matter, the Guardian Ad Litem maintained close contact with the minor children and monitored this matter closely. That the Guardian Ad Litem produced to the Chancery Court and the attorneys of record, four (4) written reports between the date he was appointed Guardian Ad Litem and the trial of this matter. (Trial Exhibit 3, RE 99-137)

That on or about April 16, 2008, Edward Matthew Boyd filed his Affirmative Defenses, Answer and Counterclaim in this matter, as well as propounded his First Set of Interrogatories, Request for Production of Documents and Request for Admissions (Trial Exhibit 11 - 24, RE 12,20)

That Lisa King Boyd failed to respond to the Request for Admissions within thirty (30) days as required by Rule 36 M.R.C.P.

That on or about October 10, 2008, an Agreed Scheduling Order was entered, some six (6) months after the original discovery had been propounded to Lisa King Boyd, establishing time lines for additional discovery. (Trial Exhibit 29)

That on or about February 2, 2009, Edward Matthew Boyd filed his Motion to Compel Answers to Interrogatories and Request for Production that were previously propounded April 16, 2008. (Trial Exhibit 33) That the Motion to Compel Answers did not address the Request for Admissions as they were deemed admitted thirty (30) days after filing pursuant to Rule 32 M.R.C.P.

That on or about April 1, 2009, a Second Agreed Scheduling Order was entered. (Trial Exhibit 41, RE 23). In said Second Agreed Scheduling Order Lisa King Boyd was given until April 15, 2009, to answer the previous Interrogatories filed on April 16, 2008, however, said Order was silent as to the original Request for Admissions filed April 16, 2008, in as much as they were deemed admitted pursuant to Rule 32 M.R.C.P.

That on or about April 20, 2009, some one (1) year after the initial filing of his Request for Admissions by Edward Matthew Boyd. Lisa King Boyd produced the following (Trial Exhibit 106, RE 51)

REQUEST FOR ADMISSIONS

- 1. Plaintiff admits paragraph 1
- B. Plaintiff denies paragraph 2
- C. Plaintiff denies paragraph 3
- D. Plaintiff denies paragraph 4
- E. Plaintiff denies paragraph 5
- F. Plaintiff denies paragraph 7
- G. Plaintiff denies paragraph 8
- H. Plaintiff denies paragraph 10

- #6 - I have been tested and diagnosed with ADHD. Prescribed medicines include Concerta and Ritalin. Matt has taken these medicines, which he refers to as "focusin' drugs" on several occasions (while driving long distances etc) although he has never been prescribed these meds.
- #7 - Girls have asked that Matt take them to school on occasion. I have been late more often than Matt. There was a bus that came right by our house, but Matt refused to let the children ride it. It was the Mt Charity bus.

That this matter was scheduled to be tried on November 17th and November 18th, 2009, in the Chancery Court of Leake County, Mississippi. (Trial Exhibit 147)

That Edward Matthew Boyd filed his Motion to Deem Matters Admitted on August 21, 2009, (Trial Exhibit 138 RE 52) The day before trial in this matter Cayla Delaine Boyd and Mariah Daniele Boyd filed Statement of Preference for Custodial Parent, asking the Honorable Court to recognize their desire for Lisa King Boyd as their preferential parent. (Trial Exhibit 152, 153 RE 59, 60)

That on November 17, 2009, the Chancery Court of Leake County granted Edward Matthew Boyd Motion to Deem Matters Admitted. (Trial Exhibit 152, 153 RE 59,60) Thereafter, the Court properly denied Lisa King Boyd's Motion to Reconsider regarding the Request for Admissions on November 18, 2009. (Trial Exhibit 172, RE 79)

That on November 17, 2009, Lisa King Boyd and Edward Matthew Boyd amended their Complaint, Answer, Affirmative Defenses and Counterclaim and entered a Stipulation-Irreconcilable Differences. (Trial Exhibit 161, RE 68) That the only issues to be tried were the following six (6) issues: (Trial Exhibit 165 - 171, RE 72-78)

1. Custody and visitation with the minor children of the parties namely, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, Emily Anna Boyd, Cayla Delaine Boyd, and Mariah Danielle Boyd.

2. Amount of Child Support to be paid by the non-custodial parent.
3. Which party shall claim the children as a tax deduction on their Federal and State income taxes.
4. Which party shall provide a policy of health insurance on the minor children.
5. Which party shall have the exclusive use and ownership of the 1998 Chevrolet Z-71 truck, the 2001 GMC Yukon XL and the 2005 Nissan Centra.
6. Which party shall be responsible for the Guardian Ad Litem fees.

That this matter was tried on November 17th and November 18th, 2009, in the Chancery Court of Leake County, Mississippi, and the Honorable Chancery Court of Leake County, Mississippi entered its opinion and Final Judgment on January 6, 2010, awarding custody of Cayla Delaine Boyd to Lisa King Boyd; and awarding custody of Mariah Daniele Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd to Edward Matthew Boyd. (Trial Exhibit 200-214, RE 80-84)

That the decision of the Honorable Chancery Court of Leake County, Mississippi, regarding custody in this matter coincides with the recommendation of the Guardian Ad Litem in this matter by virtue of the Guardian Ad Litem Final Report. (Trial Exhibit 3) Pursuant to the laws of the State of Mississippi, the Court is not obligated to follow a child's statement preference in child custody matters and said child custody is based upon best interest of the child. It is obvious in this matter that the Chancery Court of Leake County, Mississippi, being the trial of fact and having broad discretion therein took into account the two children's age, however, the Court, upon hearing this matter found in the best interest of said child to place Mariah Danielle Boyd with Edward Matthew Boyd.

That the Court did not fail to apply Mississippi Code §93-5-24(9) that the evidence presented in this matter, is that of a couple whose marriage had obviously failed. That the Chancery Court of Leake County, Mississippi heard the evidence regarding this matter and at no time was any credible evidence presented that would cause §93-5-24(9) of the Mississippi Code of 1972 to be triggered in this matter. That the Appellee denied any such allegations and that this matter was investigated by the Guardian ad litem and no evidence of doctor bills, police reports, arrest records of such evidence was ever presented at the trial of this matter. Therefore, that the decision of the Chancery Court of Leake County was not against the over-whelming weight of the evidence and the Court did not misapply the law as to the best interest of the child in awarding the Appellee custody of the minor children.

SUMMARY OF THE ARGUMENT

The Court did not err in granting Edward Matthew Boyd's Motion to Deem Request for Admissions Admitted. That pursuant to Rule 36 M.R.C.P., Request for Admissions not answered within thirty (30) days are admitted. Further, the Court did not err in granting the Motion of Edward Matthew Boyd's Request for Admissions To Be Deemed Admitted due to Lisa King Boyd never filing in this matter any objection or request to shorten or extend this matter at any time up to the date of trial in this matter.

That the Chancery Court of Leake County, Mississippi, and Hon. Johnny W. Pope, Guardian Ad Litem, did not misapply the Albright Factors. That the Guardian Ad Litem had been involved in this matter since December 19, 2009, and filed a report stating that it is in the best interest of said children that Edward Matthew Boyd have custody of the children. That the Court, after hearing testimony regarding this matter for two (2) days found that based upon the evidence and the Albright

Factors, it was in the best interest of the children that Lisa King Boyd have custody of Cayla Delaine Boyd, and that Edward Matthew Boyd have custody of Mariah Daniele Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd.

That the Chancery Court of Leake County, Mississippi, did not err in refusing to honor the child selection of parent in which to have custody over the age of twelve years old. That the Court in this matter did not rely solely upon the matters deemed admitted, or the elections made by two (2) of the children, but heard all other evidence presented regarding the best interest of the children, and based custody upon the best interest of the children. That the Chancery Court of Leake County, Mississippi, did not fail to apply Mississippi Code Annotated § 93-5-24(9). That no credible evidence was presented in this matter that would trigger § 93-5-24(9) the Mississippi Code of 1972. That the testimony of Edward Matthew Boyd denied any such accusations of family violence in this matter. Further, the Guardian Ad Litem in this matter addressed this allegation early on in the Guardian Ad Litem Report and found that Edward Matthew Boyd was not disqualified as being a custodial parent in this matter. Further, that the Chancery Court as the trier of the facts in this matter, weighed the credibility of each witness and testimony given in this matter and therefore, the Chancery Court of Leake County, Mississippi, was correct in not applying Section 93-5-24 of the Mississippi Code of 1972 to this matter.

That the Honorable Chancery Court of Leake County, Mississippi, and the Guardian Ad Litem did not ignore the Albright Factors, that the Court's ruling was not against the overwhelming evidence, but found that it was in the best interest of the children that the custody of Mariah Daniele Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd be awarded to Edward Matthew Boyd.

ARGUMENT

ISSUE ONE: That the Chancery Court of Leake County, Mississippi did not err in granting Edward Matthew Boyd's Motion to Deem Matters Admitted.

That Rule 36 of the Mississippi Rules of Civil Procedure states as follows:

".....the matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the Court may allow, the party to whom the request is directed serves upon the party requesting the admissions a written answer or objection addressed to the matter, signed by the party or his attorney, but, unless the Court shortens the time the Defendant shall not be required to serve answers or objection before the expiration of forty-five (45) days after service of the summons upon him....."

That Edward Matthew Boyd propounded and filed ten (10) Requests for Admissions to Lisa King Boyd on April 16, 2008, (Trial Exhibit 21, RE 20), with service upon her attorney of record as evidence by the Certificate of Service of the attorney for Edward Matthew Boyd. (Trial Exhibit 23, RE 22)

That Lisa King Boyd made no effort to file any petition with the Court to address additional time in which to answer these Request for Admissions and never provided any compelling reason for not complying with Rule 36 M.R.C.P., and therefore at the expiration of thirty (30) days after service, the Request for Admissions were admitted. That Lisa King Boyd claims in her argument that the following response served upon the attorney for Edward Matthew Boyd, some twelve (12) months after the service of the Request for Admissions were her Answer to Request for Admissions. (Trial Exhibit 106, RE 51)

REQUEST FOR ADMISSIONS

1. Plaintiff admits paragraph 1
2. Plaintiff denies paragraph 2
3. Plaintiff denies paragraph 3
4. Plaintiff denies paragraph 4

5. Plaintiff denies paragraph 5
6. Plaintiff denies paragraph 7
7. Plaintiff denies paragraph 8
8. Plaintiff denies paragraph 10

#6 - I have been tested and diagnosed with ADHD. Prescribed medicines include Concerta and Ritalin. Matt has taken these medicines, which he refers to as "focusin' drugs" on several occasions (while driving long distances etc) although he has never been prescribed these meds.

#7 - Girls have asked that Matt take them to school on occasion. I have been late more often than Matt. There was a bus that came right by our house, but Matt refused to let the children ride it. It was the Mt Charity bus.

That Edward Matthew Boyd is fully aware of a Chancellor's broad discretion in discovery matters. However, in no way can someone disrespect the Rules of Civil Procedure in such a manner as to claim admissions were answered some twelve (12) months after service upon them.

Lisa King Boyd relies on a Second Agreed Scheduling Order in this matter as a defense to not timely answering her Request for Admissions. (Trial Exhibit 41, RE 23) That the Second Agreed Scheduling Order specifically addresses the previously propounded interrogatories filed April 16, 2008, however, said Second Agreed Scheduling Order was silent as to Request for Admissions filed April 16, 2008. (Trial Exhibit 41, RE 23) Therefore, the papers on file in this matter resolved the issue regarding the admissions, in as much as the previous propounded request for admissions were deemed admitted at the time the Second Agreed Scheduling Order was entered. That the Second Agreed Scheduling Order established a time line for additional discovery, not that filed April 16, 2008. (Trial Exhibit 41, RE 23)

It is well settled law in the State of Mississippi that matters of discovery are left to the sound discretion of the Trial Court, and discovery orders would not be disturbed unless there has been an abuse of discretion. (*Scoggins v. Baptist Memorial Hospital* 967 So.2d 646(Miss.2007)) Here, as

in *Scoggins*, request were deemed admitted at the expiration of thirty (30) days after service which is in accord with Rule 36 M.R.C.P.

That Lisa King Boyd never attempted to seek relief in any manner regarding the Request for Admissions served upon her prior to the Trial in this matter. Further, in no way could the documents filed by Lisa King Boyd (Trial Exhibit 68, RE 28) be timely filed as argued by Lisa King Boyd in as much as her attempt to answer discovery came in excess of a year after the Request for Admissions had been served upon her. Further, the Second Agreed Scheduling Order in which she relied provides for no additional time to Answer the Request for Admissions that was previously served upon her. (Trial Exhibit 41, RE 23)

In *Hamby v. Leverock*, 23 So.3d 424, 432 (Miss. 2009) it is stated as follows:

"Matters of discovery are left the sound discretion of the trial court, and discovery orders will not be disturbed unless there has been abuse of discretion." *Scoggins v. Baptist Mem'l Hosp. - DeSoto*, 967 So. 2d 646, 648 (Miss. 2001)

That pursuant to Rule 36 M.R.C.P. and further, as ruled in *Hamby, Id.*, request for admissions are conclusively established on the parties failure to answer within thirty (30) days or as such time as the Judge has determined appropriate. To reemphasize here, at no time prior to the trial in this matter, did Lisa King Boyd seek relief from the thirty (30) day requirement pursuant to Rule 36 M.R.C.P. in which to answer the Request for Admissions.

Further, the argument of Lisa King Boyd regarding the Chancellor's use of matters deemed admitted as being the sole basis of her custody decision is without merit. The Chancellor was cognizant of the facts of the Request for Admissions deemed admissible and could not alone establish custody and stated in her opinion: (Trial Exhibit 200, 202, RE 80, 82)

"In numerous civil cases, the appellate courts have upheld a trial court's application of a party's admission under Rule 36 even if the admission was dispositive of the case or otherwise went to a central legal issue. The most applicable domestic case this Court has found is *Gilcrease v. Gilcrease*, 918 So.2d 854 (Miss. Ct. App. 2005). *Gilcrease* was a divorce where custody was one issue the Chancery Court of Warren County had to adjudicate. In the husband's discovery he propounded request for admissions upon his wife which were not answered in accordance with the Rules. The Chancellor deemed the admissions admitted at trial but held that admission number 7 (Admit that the best interest and welfare of your minor son ... would be if custody were placed in the father ...) was not binding upon the Court. All other admissions were accounted for within the Chancellor's opinion. The Court of Appeals affirmed the Chancellor holding that child custody is a judicial determination and not merely an evidentiary matter. Therefore, this Court will consider each of the ten admissions along with all other evidence presented as none of the admissions seem to fit into the narrow exception from *Gilcrease* ."

That Chancery Court of Leake County, Mississippi, ruled in this matter based upon the facts and evidence presented to the Court and that the Court did not rely solely upon the Request for Admissions to establish custody. The Request for Admissions were admitted thirty (30) days after service upon Lisa King Boyd due to her not answering the Request for Admissions or seeking relief from the Chancery Court of Leake County, Mississippi.

ISSUE TWO: The court did not err in refusing to award custody of Mariah Boyd, a child over the age of twelve years, who stated a preference to Lisa King Boyd, Appellant

In any custody case the paramount and ultimate goal must be the best interest of the child. *Hamby v. Leverock*, 23 So.3d 424, 432 (Miss.2009). Further, it is the well settled law in the State of Mississippi in custody cases that reviews are limited and reversal occurs only if the Chancellor is manifested wrong or applied an erroneous legal standard *Floyd v. Floyd*, 949 So.2d 26 (Miss. 2007). Further, to disturb the factual finding of a Chancellor in child custody cases the Appellant Court must determine that the factual findings are manifest wrong, clearly erroneous or the

Chancellor abused his desecration *Hollon v. Hollon* 784 So. 2d 943 (Miss. 2001) . Lisa King Boyd argues that due to Mariah Daniele Boyd being over twelve (12) years of age and having made an election as to which parent she wished to live (Trial Exhibit 153, RE 60), that the Chancery Court was in error by not abiding by her wishes. It should be noted that one of the cases that Lisa King Boyd bases in her argument is *Floyd v. Floyd*, 949 So. 2d 26 (Miss. 2007). It should be noted that *Floyd v. Floyd* was a matter regarding a modification and not that of an initial custody determination as was the case *sub judice*.

In all custody matters the polestar consideration is the best interest and welfare of the child *Phillips v. Phillips*, 45 So. 3rd 604 (Miss.2008). Lisa King Boyd argued that the Chancellor did not address valid reasons regarding not allowing the child over twelve (12) years Election of Parent s to Custody stand. That in *Phillip* the Court has stated that a child's preference as to custodial parent is not outcome determining, nor is the Court obligated to follow the child's preference in child custody matters. That in the case *sub judice* it is obvious the Court took into account of the child's election as she addressed this specific issue in judgment and opinion. (Trial Exhibit 200, 206; RE 80, 86)

That this case was one of an initial custody decision and not one of modification of a previous custody order. The Chancellor heard all evidence and was in the best position to determine the credibility of the evidence, it should be noted that the election filed by Mariah Danielle Boyd was filed the day before Trial without discussing same with the Guardian Ad Litem (Trial Exhibit 200, 206; RE80, 88). The well established law of the State of Mississippi is that the findings of the Chancellor as to divorce, child custody, and child support issues will not be disturbed or set aside on appeal unless the decision of the Chancellor was manifestly wrong and not supported by

substantial credible evidence, or clearly erroneous. In this matter the Chancellor was not manifestly wrong and was supported by substantial credible evidence and was not clearly erroneous.

ISSUE THREE: The Court did not err regarding the application of Section 93-5-24(9)(a)(I) regarding the Custody of the five youngest Boyd daughters.

That no credible evidence was presented at trial regarding any type of family violence. That the testimony in Court regarding incidents of conflict between Lisa King Boyd, Cayla Delaine Boyd and Edward Matthew Boyd was that of the sole testimony of Lisa King Boyd and Cayla Delaine Boyd.

That further, during the trial of this matter it was obvious that Cayla Delaine Boyd has distanced her relationship from her adoptive father, Edward Matthew Boyd, and was not objective in her testimony but solely on the side of Lisa King Boyd.

That Lisa King Boyd went to great lengths in her brief reproducing testimony of incidents she alleges Edward Matthew Boyd committed family violence. However, it should be noted that Lisa King Boyd and Cayla Delaine Boyd went to great lengths to picture Edward Matthew Boyd as creator of family violence. On cross examination, Cayla Delaine Boyd testified and admitted that she and Lisa King Boyd had collaborated on the issue of what she would testify to regarding Edward Matthew Boyd's alleged acts of family violence.

Q. Okay. So is it fair to say that any thing I that you have testified to today is specific things that you and your mother remembered or recalculated to make sure that you testified to today?

A. There is very few things on here that I didn't remember and she helped me remember.

This is just all the stuff that I could think of that possibly happened.

Q. What I'm saying is that y'all went over this list, did you not?

A. Yes.

As much as Lisa King Boyd and Cayla Delaine Boyd testified as to acts of family violence, Edward Matthew Boyd was **adamant that no family violence occurred** during the marriage.

Q. Matt, I'm going to show you some documents that are marked as Exhibit 7. It's a compilation of pictures. Can you look at those? Do you recognize any of those pictures?

A. The first time I saw these was today. That's my daughter Margaret, and I see her standing there on a bed with her favorite picture of me. She gave me that little -- that's a little candleholder that she gave me for Christmas the year after Lisa left. I took them all Christmas shopping, and she bought that for me.

Q. It appears to be marks --

A. I did not do that. No, sir. I have never seen that.
These pictures of Emily I had not seen until today.

Q. Did you place these marks on Emily?

A. I did not.

A. Okay. These right here, which appears to be pictures of Emily, did you place those marks--

A. Yes, I did, unfortunately. This was an incident while Lisa and I were still living together. And Lisa was gone that day, and one of the ways you can verify that is you

can look in those pictures and see how it was straightened up in there because I was home with the children. I don't remember what Emily did, but I got down a fly swatter that had -- I just grabbed the fly swatter that was on the front of the list. It was a purple fly swatter and had little serrations on the end. It was a little thin plastic thing and it was broken in the middle. And I just swatted her leg with it and this was the result, and those little tiny scratches on her are from the little tip on that thing. And I took that fly swatter and threw it in the trash when I saw what it had done to Emily.

Q. Matt, there has been some testimony that you kicked Margaret off the front porch or down some steps. Did that ever happen?

A. No, sir. That day -- I often took vacation time to clean the house. When it got like it looked in that picture, I took vacation time, and I would clean the house. I would take an extra day, and I would spend Thursday and Friday cleaning the house instead of all day Friday or part of the day Saturday. I had cleaned the house. Elena came over. And if you've ever been a cleaner where there's carpet or hardwood floor, you know that glitter is not your friend. And I got up that morning, and Lisa had let them get out the glitter. I wasn't aware she had given it to them. They weren't coloring as she said. They had glue and glitter, and these are little girls. Margaret was six. They didn't put a little bit of glitter. They had a lot of glitter. It was on the bed. It was in the drawers. It was on the counters. It was on the floor. It was

everywhere. And I ran them out of there so I could clean it up. And, yes, Margaret was going down the stairs. I went down the stairs behind her, and I gave her a swat on the behind and tumbled her right over.

Q. Okay. Have you ever walked around naked in front of your children?

A. No, sir, not that I'm aware of. Now, I've been naked around the children, especially when they were smaller. Lisa would send them in and say mama said to take a shower, and she would send them in the shower with me when they were little. But, no. When they start referencing the difference in the body parts, it's time.

Q. Have you ever grabbed Cayla inappropriately in --

A. Never. Never have I grabbed Cayla or touched her anywhere on her person inappropriately.

Q. There's been some testimony about your wife falling in the kitchen or right there on the counter.

A. Yes, sir.

Q. Okay. Would you tell the Court about that?

A. Yes, sir. We had come back from a trip from Oklahoma.

We had got in. It was one-thirty or two in the morning. I had been driving. I got everybody up. I asked Cayla to help me get the girls out -- I was carrying in the children -- help get the bags out of the car and that kind of thing. I'm moving stuff. I'm moving children. Where's Cayla? I haven't seen her. Lisa's coming in and out

with stuff. I'm coming in and out with stuff. I go in and Cayla's laying on her bed. I said, "Cayla, I told you, you need to help us. We're all tired. We all want to get this done. We all want to get in bed." And she started sassing me. I was tired, and I said, "That's it." You know, this is a teenage daughter, and this was about 2006, so that would make Cayla about sixteen years old. And I grabbed her by the wrist and said, "Put your hands right here on this counter." There's a little bar that sticks out between where the dining room table is and the kitchen, and I leaned over and, you know, Cayla's not real tall, and I was spanking her with my left hand on the buttocks, and Lisa starts screaming and is on my back. I turn around and stand up from leaning over her, and Lisa's on the floor on her butt up against the dishwasher, and then the screaming commenced. And I was right in the screaming. I was upset that Lisa would jump on me. I've always been upset. Lisa has always -- Lisa has never interrupted me when disciplining any of the children, except on occasion Mariah, and every time she didn't ask me to do it, Cayla.

Further, there was no evidence or testimony regarding any arrest, citations, records regarding law enforcement being called or any other testimony that would have triggered § 93-5-24(9) of the Mississippi Code of 1972.

Further, that the Guardian Ad Litem set forth all the allegations made by Lisa King Boyd that she claims were occurrences of family violence by Edward Matthew Boyd. After investigating this matter, the Guardian Ad Litem found that Edward Matthew Boyd had not been charged with domestic violence, nor had been convicted of any. (Trial Exhibit 17, RE 99) Further, that the

Guardian Ad Litem investigated all of the matters alleged by Lisa King Boyd regarding Edward Matthew Boyd's behavior and found that the only incident that resulted in injury could have been ruled an accident as much as the same way as being declared an act of domestic violence. (Trial Exhibit 17, RE 99, 118) That the Chancery Court in this matter heard the testimony and weighed the credibility of each witness. That based on testimony in this matter no credible evidence was presented to the court that invoked Section 93-5-24-9 of the Mississippi Code of 1972.

ISSUE FOUR: The Court did not err in the application of the Albright Factors

That the Supreme Court of Mississippi has established a series of factors that should be addressed by the Court in determining the best interest of the child as to which parent is granted custody in *Albright v. Albright* 437 So. 2d 1003 (Miss. 1993). That Lisa King Boyd claims that the Courts are in error in considering the Request for Admissions, ignoring the preference of the child and misapplying the abuse factor in weighing the Albright Factors which would have clearly favored Lisa King Boyd. However, in reviewing the Albright Factors, it is clear that the Court was not in error in granting custody to Edward Matthew Boyd.

In Determining said factors:

1. A Determination of the parent who has the continuity of care prior to the separation:

That the testimony was clear in this matter that based upon testimony during trial as well as the Guardian Ad Litem Reports it is clear that Edward Matthew Boyd was the primary care giver of the children, as well as the primary custodian of the house and therefore, the Court was not error in allowing this factor to favor Edward Matthew Boyd

2. Which parent has the best parenting skill and which has willingness to provide primary child care:

Testimony was given at trial regarding parenting skills together with the concerns of the Guardian Ad Litem while the children were in the care of Lisa King Boyd clearly favored Edward Matthew Boyd in this matter. (Trial Exhibit 3, RE 99 - 137)

3. Willingness to provide primary care:

The Court found that this factor favored neither party, however, the testimony revealed that Lisa King Boyd is on numerous prescribed medications. That Lisa King Boyd has no family support living in this area. That Lisa King Boyd depends on Friends to help her with the children, however, Edward Matthew Boyd has numerous family members to help with the children. That this Court found in *Webb v. Webb* 974 So. 2d 274 (Miss. 2008) that family members living nearby to be a factor in his favor. That this factor should have been decided in favor of Edward Matthew Boyd.

4. The emotional ties of the parent to child:

The Court found that neither party was favored in this factor. That it is obvious that Cayla Delaine Boyd has distanced herself from her adoptive father, Edward Matthew Boyd, and his family. However, as established in this matter, Edward Matthew Boyd spends much more time with the children than Lisa King Boyd. Therefore, the emotional ties of parent to child should have favored Edward Matthew Boyd.

5. Moral fitness of the parents:

That Lisa King Boyd argues that for the use of admission that this factor would favor Lisa King Boyd, however, the Court found that this factor did not favor either party, and therefore, the moral fitness of the parents was not influenced by the admissions.

6. The preference of the child that is age sufficient to express preference by law:

Cayla Delaine Boyd and Mariah Daniele Boyd did in fact file elections the day before trial in this matter. The fact is, the eldest child Cayla Delaine Boyd has left home, and is a full time student in college. That her election is basically moot in this matter. That based upon the best interest of the child, this election should have been ignored.

7. The stability of the home environment of the home of each parent:

That Lisa King Boyd has had numerous jobs during the course of the marriage. That Edward Matthew Boyd has had one steady employment since the parties moved back to Mississippi. That Lisa King Boyd has no family in this area and depends upon a network of friends in which to aid her. That Lisa King Boyd's support group is people she has known for only a short period of time. That Lisa King Boyd's witnesses at trial were people she had known only a short period of time. That Edward Matthew Boyd is surrounded by substantial amounts of family including but not limited to his mother, father, aunts, uncles and other friends that provide a stable life for the children. That the home Edward Matthew Boyd is the same home in which the children were being raised prior to the divorce in this matter. That Lisa King Boyd has moved twice since the separation and is currently living in a home owned by a Trust. This factor clearly favors Edward Matthew Boyd.

CONCLUSION

1. That the Chancery Court of Leake County, Mississippi, did not error in finding that the request for Admissions filed April 16, 2008, were admitted thirty (30) days after service of upon Lisa King Boyd. That Lisa King Boyd never sought relief from the court prior to the trial in this matter, to address her failure to answer.

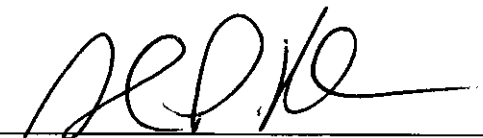
2. In custody matters the determining factor is the best interest of the child. Therefore, the Court did not error in awarding custody of Mariah Daniele Boyd to Edward Matthew Boyd even after the parental election was filed by Mariah Daniele Boyd the day before trial in this matter.

3. That the trial Court in this matter properly relied upon all evidence presented and testimony given, as well as the Guardian Ad Litem Report, and properly found that Section 93-5-24-9 was not a factor to be used in this matter.

4. That the Albright Factors were properly applied in the trial of this matter, and custody was properly awarded of Mariah Daniele Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd to Edward Matthew Boyd.

Therefore, this court should affirm the decision of the Chancery Court of Leake County, Mississippi, regarding the granting of custody of Mariah Daniele Boyd, Megan Ashley Boyd, Margaret Ellen Recie Boyd, Madeline Lisa Boyd, and Emily Anna Boyd, to Edward Matthew Boyd.

Respectfully Submitted,



Hon. Alan D. Rhea

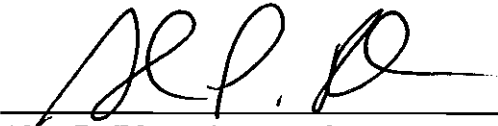
OF COUNSEL:
Hon. Alan D. Rhea
Hon. Dexter C. Nettles
NETTLES & RHEA ATTORNEYS
Post Office Box 148
Carthage, MS 39051
Telephone: 601/267-8404
Facsimile: 601/267-8633

CERTIFICATE OF FILING APPELLEES' BRIEF

I CERTIFY THAT on this day I mailed the original and three copies of the Appellees' Brief, a computer disk in word perfect format containing a copy of the brief as required by Rule (30) (a) to the Clerk of the Supreme Court of Mississippi at the following address to be filed in this cause:

**MS. Kathy Gillis
Mississippi Supreme Court Clerk
450 High Street
Jackson, MS 39205**

This the 13th day of January, 2011.



**Alan D. Rhea, Counsel for
Edward Matthew Boyd, Appellee**

CERTIFICATE OF SERVICE

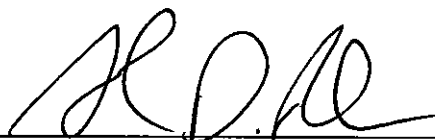
I, **Alan D. Rhea**, Attorney of Record for Defendant, have this day served a true and correct copy of the above foregoing **APPELLEE'S BRIEF**, by mailing same via United States Mail, postage prepaid, upon the following Counsel of Record as indicated:

Hon. James C. Mayo
FAIR & MAYO
P O Box 509
Louisville, Mississippi 39339
Attorney for Appellant

Hon. Johnny W. Pope
P. O. Box 329
Carthage, MS 39051
Guardian ad Litem

Hon. Cynthia Lee Brewer
Eleventh Chancery Court District
P. O. Box 404
Canton, Mississippi 39046
Trial Judge

This the 1st day of January, 2011.



Alan D. Rhea, Attorney for Appellee,
Edward Matthew Boyd

DOM/BOYD.BRIEF