IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRIDGETTE MARIE PARRA **APPELLANT**

VS. **NO. 2010-CA-00339**

PAUL WILLIAM PARRA **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualifications or recusal.

1. Paul William Parra
   Appellee

2. Bridgette Marie Parra
   Appellant

3. Travis T. Vance, Jr., Attorney for Appellant
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   Vicksburg, MS 39183

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TRAVIS T. VANCE, JR., for Appellee
Paul William Parra

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STATEMENT OF THE ISSUES ON BEHALF OF THE APPELLEE IN DEFENSE OF THE ALLEGATIONS OF THE APPELLANT

1. THE LOWER COURT IN ITS FINAL OPINION, PAGE 6 OF SUCH ORDER, STATED IN PARAGRAPH 1 "THAT THE COURT RESERVES ITS RIGHT TO REQUIRE BRIEFS FROM THE ATTORNEYS." THE COURT FURTHER RESERVED ITS RIGHT TO MAKE FINDINGS OF FACTS AND CONCLUSIONS OF LAW. THAT APPELLANT, THROUGH HER ATTORNEY, NEVER REQUESTED THE COURT TO MAKE FINDINGS OF FACTS AND CONCLUSIONS OF LAW, THEREFORE, THERE IS NO ERROR IN THE LOWER COURT AWARDING CUSTODY OF THE MINOR CHILDREN TO APPELLEE WITH THE LOWER COURT CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES IN AWARDING CUSTODY OF SUCH MINOR CHILDREN TO APPELLEE.

2. THE ISSUE OF THE APPELLEE MOVING FROM THE STATE OF MISSISSIPPI TO CALIFORNIA WAS NOT AN ISSUE IN THE CASE IN CHIEF AND THERE IS NO TESTIMONY OR FACTS FROM EITHER PARTY OR WITNESS THAT STATED TO THE COURT THAT REMOVING THE CHILDREN FROM MISSISSIPPI TO CALIFORNIA WAS NOT IN THE BEST INTEREST AND WELFARE OF SUCH MINOR CHILDREN AND THEREFORE THE COURT DID NOT COMMITT ERROR IN DENYING APPELLANT'S MOTION TO RECONSIDER.

3. THAT THE LOWER COURT HAD SUFFICIENT TESTIMONY AND EVIDENCE TO DETERMINE THAT THE BEST INTEREST AND WELFARE OF THE MINOR CHILDREN SHOULD BE IN THE CUSTODY OF APPELLEE. AFTER CONSIDERING ALL OF THE TESTIMONY AND THE EVIDENCE AND FINDING THAT THE TOTALITY OF CIRCUMSTANCES AND PLACED SUCH CHILDREN IN THE CUSTODY OF APPELLEE WAS IN THE BEST INTEREST AND WELFARE OF SUCH MINOR CHILDREN. THE COURT CONSIDERED THE ALBRIGHT FACTORS AND TESTIMONY ADDUCED BY EACH OF THE RESPECTIVE PARTIES IN MAKING SUCH DECISION AND CONSIDERED SAME IN MAKING THE DECISION AS TO THE CUSTODIAL RIGHTS OF EITHER ONE OR BOTH PARTIES WITH THE MINOR CHILDREN.

STATEMENT OF THE CASE

Mr. and Mrs. Paul Parra were married on October 4, 1999. (R. pg. 53) That at the time of the marriage between the parties Mr. Parra described Mrs. Parra as a damn good mom. She was a good wife. She was like I said, she was my dream come true. We were a close knit family. We were the American dream. (R. pg. 125) The parties had no real problems until the last year of their marriage. During the period of the marriage Mr. Parra worked everyday and provided food, clothing, vehicles and other necessities of life for the family. (R. pg. 125) Mrs. Parra was going to school. (R. pg. 125) Mrs. Parra was studying to be a nurse. All of the children except the baby were excellent students at school. (R. pg. 127) Mr. Parra would help the children with their school work when they came home from school as Mrs. Parra was off at school and Mrs. Parra would help with school work when she was at home. (R. pg. 127) Mr. and Mrs. Parra had a three (3) bedroom and two (2) bath mobile home, 16x80, and they resided at 211 Whatley Road, Vicksburg, Mississippi. They had three (3) bedrooms in their home and the accommodations were for the benefit of the entire family. (R. 129) The Parras separated in December 2008. Mr. Parra was devastated by the separation from his wife as he wanted his marriage to work. (R. pg. 23) Mr. Parra came home and found out that his wife had left him for another man. It was in December 2008 before Christmas that the Appellee found out that Mrs. Parra had somebody else. (R. pg. 24) Mr. Parra was on a trip and found out about the relationship of Mrs. Parra with Tommy Breland, Jr., her lover. (R. pg. 24) Mr. Parra came back into Mississippi that Monday morning after Christmas and stated that when he left the children for a visit to California with his family that he did not know that his wife had cheated on him, however, he found out on the way out to California. (R. pg. 24) Mr. Parra stated that he thought when his wife told him that she did not love him anymore that there was no other man. (R. pg. 24) He finally realized that there was another man. (R. pg. 25) Mr. Parra stated that before he and his wife separated that he participated in his children's lives on a daily basis. (R. pg. 25) Mr. Parra stated he went to work everyday working for Hermatic Rush Services in

Jackson, Mississippi. Mrs. Parra started to work three or four months before she left Mr. Parra in December of 2008. (R. pg. 25) Mr. Parra stated that he was familiar with the raising of his children and that he had been helping his wife all of the years since the birth of each of his children and he loved his children very much. (R. pg. 25) Mr. Parra stated that he had been a very steady part of his children lives, caring for them on a regular basis. (R. pg. 26) Mr. Parra stated that from the inception of the marriage up and until the indiscretion on the part of his wife, Mrs. Parra, that she was a good mother. (R. pg. 26) Mr. Parra stated that he provided the children with clothes, food, a roof over their head and when they would get sick he would take them to the doctor. (R. pg. 26) After the separation, Mr. Parra was the sole provider of the children, both financially and emotionally for his children, and stated that he would wake them up in the morning, feed them for their breakfast, feed them at lunch, feed them their dinner, play with them. (R. pg. 27) Mr. Parra stated that the children would cry, asking where mama was and Mr. Parra stated that he hoped Tommy, the paramour of his wife, was worth what she was putting his children through. Mr. Parra stated that the children asked why don't mama call me. (R. pg. 27) Mr. Parra stated that during the separation the children were living with him while Mrs. Parra was with her boyfriend in Sicily Island, Louisiana, that when he would come in at night he would cook for the children, give them their baths, say their prayers, watch tv and simply enjoy his children. (R. pg. 29-30) Mr. Parra stated that he attended church and he attended as a family. The family went to St. Paul's Catholic Church in Vicksburg and he took his children and family to St. Paul's Catholic Church. (R. pg. 30) Mr. Parra stated that they had been attending the church for almost four (4) years. (R. pg. 30)

Tiffany Breland was called as a witness for Mr. Parra and stated that she had known both of the parties for about fifteen to twenty years. (R. pg. 35) Ms. Breland stated that she had observed both of the parents in their role as parents and that both, Mr. Parra and Mrs. Parra, were good parents. (R. pg. 35) Ms. Breland stated that for the last month that Mr. Parra had the children living with him and she

stated that she did not know where Mrs. Parra had been. (R. pg. 36) Ms. Breland stated that Mrs. Parra was going with her cousin, Tommy Breland, and that the affair had been ongoing for about three months. (R. pg. 36) Ms. Breland stated that about a month ago that Mrs. Parra went to live on Sicily Island. (R. pg. 36) She stated that Tommy Breland, the paramour of Mrs. Parra, mother lived in a one room house and a one bedroom house and that Tommy had a camper house on Sicily Island. (R. pg. 36) Since Mrs. Parra left Mr. Parra cared for the children and Ms. Breland had observed Mr. Parra in caring for the children. (R. pg. 37) Ms. Breland stated that Mr. Parra had done real good for the children, he has been there for them. (R. pg. 37) Ms. Breland stated that he stayed through Christmas with them and opened Santa Claus with them and he feeds them and takes care of them. (R. pg. 37) Ms. Breland stated that Paul provided for the children and stated that the best interest of the children would be that the children be on a temporary basis placed with Mr. Parra. (R. pg. 38) At the conclusion of the testimony, the Court awarded the temporary care, custody and control of the minor children to Paul Parra, Appellee herein, with Mrs. Parra being awarded the Court's standard visitation. Mr. Parra continued to have custody of the minor children until the divorce came on for hearing on its merits. Mr. Parra stated that the parties separated on or about December 16, 2008, and that Mrs. Parra had ran off with her paramour, Tommy Breland, to Sicily Island, Louisiana, to reside with her boyfriend and his mother who had a residence on Sicily Island, Louisiana. (R. pg. 53) Mr. Parra stated that his wife had been staying at four or five places, Sicily Island, Highway 3 in a little camper trailer in the back of the woods somewhere and off Oak Ridge Road in Vicksburg, Warren County, Mississippi. Mr. Parra stated that he did not know where she was living as of the date of the hearing of this cause on its merits. (R. pg. 56) Mr. Parra stated that he provided a good and stable environment after he and Mrs. Parra were separated. (R. pg. 59) Mr. Parra stated that he did not have a telephone number to contact Mrs. Parra and Mrs. Parra did not contact the children and he had no way to explain to Mrs. Parra what was going on in the children's lives as he did not have a phone number for her. (R. pg. 59)

He stated that since his wife left in December 2008 that she called the kids maybe four or five times during that period of time. (R. pg. 59) Mr. Parra stated that he tried to call Mrs. Parra so the children could talk to her, but her phone was always off because the bill was not being paid. (R. pg. 60) Mr. Parra further stated that the temporary order provided that Mrs. Parra have visitation with the children. Mr. Parra stated that he had the children available for Mrs. Parra to visit after the Temporary Order was entered on January 15, 2009. (R. pg. 61) Mr. Parra stated that the children visited with Mrs. Parra for a couple of weekends. (R. pg. 61) Mr. Parra stated that Mr. Tommy Breland, the paramour of Mrs. Parra, beat one of the minor children and the children came home and told him about the mistreatment that was received by the children at the hands of Tommy Breland, the paramour of Mrs. Parra. (R. pg. 62) Ultimately, Mr. Parra stopped the visitation because he did not want his children to be abused by Tommy Breland. (R. pg. 63) Mr. Parra states that he made arrangements for Mrs. Parra to meet to visit the children outside of the presence of Tommy Breland, Jr., when they went to Mrs. Parra's mother's home in Yazoo City. (R. pg. 63-64) The children did visit on the weekends at the residence of Mrs. Parra's mother in Yazoo City. (R. pg. 64) After the temporary hearing on January 15, 2009, Mr. Parra did everything for the minor children. (R. pg. 65) He fixed them breakfast in the morning, got them off to school, went over their homework for the night, spelling words, vocabulary words, made sure the children brushed their teeth, took their vitamins. When the children got home from school Mr. Parra would help them with their homework and fix their dinner and allow the children to go out and play. (R. pg. 65) Mr. Parra stated that he did that on a regular basis for his children as that was a good environment to raise his children. (R. pg. 65-66) Mr. Parra stated that the children completed the 2008-2009 school year and that they maintained A and B grades while in his temporary custody. (R. pg. 65) Mr. Parra stated that he felt that he should be given the custody of the children because he is a good father. (R. pg. 72-73) He took the children to church every Sunday, he said prayers with his children, he fed them, bathed them, bought their clothes and shoes and had done this continuously over

the period of time when he had the children by himself while his wife was living with her paramour. (R. pg. 73) Mr. Parra stated that he had been provided a copy of the *Albright* Factors. (R. pg. 74) Mr. Parra stated that he had one female and two male children. Mr. Parra stated that before the separation that his wife did not work except the last few months prior to the separation when she finally got a job after she got out of nursing assistant school. (R. pg. 75) Mr. Parra stated that his wife was going to school studying to be a nurses assistant for a couple years. She was attending Hinds Jr. College so that she could get her nurses assistant license. (R. pg. 76) Mr. Parra stated that he and Mrs. Parra separated in December 2008 (R. pg. 78) and that she quit her job that she had been working before the parties separated. (R. pg. 78) Mr. Parra stated that prior to the separation Mrs. Parra would be gone until two, three, sometimes four o'clock in the morning. (R. pg. 79) When Mr. Parra would ask her where she had been she would state to him that at her brother's. Mr. Parra stated that he did not know it was her boyfriend. (R. pg. 79) What really made Mr. Parra think his wife was cheating on him was when she gave Mr. Parra a STD. That was when Mr. Parra really determined that she was cheating on him. (R. pg. 80) The STD was called trick. It was a venereal disease. (R. pg. 80) Mr. Parra stated that he had not had sexual relations with anyone other than his wife at anytime prior to their separation. Mr. Parra stated that his wife went to the Health Department and got a test and determined that she had trick, an STD, and she got pills for everybody to take, including her boyfriend and her boyfriend's girlfriend, who all took medication to treat the venereal disease. (R. pg. 81)

In discussing the *Albright* Factors Mr. Parra stated that both of them participated in the everyday life of the children. Both of them took care of the children during this period of time. (R. pg. 83) That was before the parties separated. (R. pg. 83-84) Mr. Parra states that she was a good mother prior to the separation and before the cheating and all that started. (R. pg. 84) Mr. Parra stated that after Mrs. Parra became involved with Tommy Breland all of that changed in that her actions had a great effect on the children (R. pg. 84) Mr. Parra stated that a couple of months before the separation

that Mrs. Parra would drop the children off to anyone who would watch them, take care of them so she could be with her paramour. (R. pg. 84) Mr. Parra stated that he would come home from his job and find her gone. (R. pg. 84) About this same time Mrs. Parra was attending night school and Mr. Parra was feeding the children at night, providing the necessities of life for the children at night and bathing them and putting the children to bed on a regular basis at the time that Mrs. Parra was attending night school. (R. pg. 85) Mr. Parra also stated that he helped with the children's school lessons. Mr. Parra stated that he had good parenting skills and that parenting skills meant to him that he made sure his children were healthy, they got food, they got clothes and everyday things they needed. (R. pg. 86) Mr. Parra stated that he took care of medical problems and spiritual problems and any other problems that they had. (R. pg. 86) Mr. Parra stated that two years before the separation that the daycare primarily took care of the children a lot and that both Mr. and Mrs. Parra would cook dinner when Mrs. Parra was there. Mr. Parra stated that a lot of the times he would come home nothing would be cooked so he had to cook dinner for the children. (R. pg. 86) During the last year of the parties marriage Mrs. Parra was not at home at all. She went school, she worked some nights during the week. (R. pg. 87) Mr. Parra stated that he rated himself better than his wife during that period of time as having the proper parenting skills to raise the children. (R. pg. 87) Mr. Parra stated that he had the willingness and the capacity to provide the primary parenting skills. He stated that he performed those tasks on a regular basis during the two years before the separation and the last year that Mrs. Parra did not do her part. (R. pg. 87) Mr. Parra was able to leave his job and take care of the children on emergency basis or otherwise. (R. pg. 89) Mr. Parra stated that he was in good mental and physical health and he was 38 years old. (R. 89-90) Mr. Parra stated that the children were very close and that they had great love and affection for each other and over the last year that they had gotten very close. (R. g. 90) Mr. Parra stated that if any emergency arose during the period of time wherein Mr. and Mrs. Parra were present and the children would get hurt that the children would go to either one or both parents. (R. pg. 90)

Mr. Parra stated that the children were closer to him than they were to Mrs. Parra for emotional ties. (R. pg. 90) There is no question of the moral fitness of Mrs. Parra in that she committed acts of infidelity. (R. pg. 91) Mr. Parra stated that he had never cheated on his wife and that he had dedicated his life to his wife and to living the American dream with his wife and children. (R. pg. 91) Mr. Parra stated that Mrs. Parra is immoral in her actions in shacking up with her paramour. (R. pg. 91-92) Mr. Parra stated that his wife committed by adultery by admission to him. (R. pg. 92) Mr. Parra stated that he had a stable home environment. (R. pg. 93) Mr. Parra stated that he provides all of the duties as a parent in getting them off to school, feeding them breakfast, dinner, playing games with the, provide lights, water and gas and all of the necessities of life. (R. pg. 93-94)

Then Mr. Parra called as his witness Casey Pettway, who is the step-sister of his wife, Mrs. Parra. (R. pg. 141) Ms. Pettway stated that she had known Mr. Parra for probably nine and one-half year. (R. pg. 142) Ms. Pettway stated that she started visiting the Parra home when she was thirteen years old and she was twenty years old now. (R. pg. 142) Ms. Pettway stated that she really got to know Mr. and Mrs. Parra after their first child had been born insofar as the family was concerned. (R. pg. 143) Ms. Pettway stated that she visited with them every day for a period of time then went to at least three times a week. (R. pg. 144) Ms. Pettway stated that Mrs. Parra would be in school at some of the times she visited and Mrs. Parra would be at home with Mr. Parra on some occasions. (R. pg. 144) Ms. Pettway stated that she had an opportunity to observe both of them in their roles as mother and father. (R. pg. 144) Ms. Pettway stated that she observed both of them in their roles as parents. (R. pg. 145) Ms. Pettway stated that at the very beginning both of them were awesome parents and you could not ask for anything better in caring for their children and providing for the needs of their children. (R. pg. 145) Ms. Pettway stated that they both loved their children very much and they met the children's needs. (R. pg. 146) Ms. Pettway stated that she noticed a change in Mr. and Mrs. Parra's relationship as time went by. (R. pg. 146) Ms. Pettway stated that about a year and one-half before the

separation that Mr. and Mrs. Parra were role models for the children. (R. pg. 146) After that period of time something happened. (R. pg. 146) Ms. Pettway stated that Mrs. Parra started seeing Tommy Breland and that everything went downhill from there. (R. pg. 146) Ms. Pettway stated that Mrs. Parra would be gone all of the time for no reason and no one knew where she was. (R. pg. 147) Ms. Pettway stated that Mrs. Parra asked her to sleep with her husband, Paul. (R. pg. 149) Ms. Pettway stated are you crazy. Mrs. Parra stated that she would pay her to do it. (R. pg. 149) Ms. Pettway stated the reason she asked her to sleep with her husband was because she was running around on her husband and she knew that she had messed up. (R. pg. 149) Ms. Pettway stated that her moral vein has completely changed from the first time she knew her. (R. pg. 149) Ms. Pettway stated that before Mrs. Parra got with Tommy Breland she was a great person. (R. pg. 150) Ms. Pettway stated that she did not even know Mrs. Parra as the same person anymore. (R. pg. 150) Ms. Pettway stated that she had been in the presence of Paul in his role as father in raising the children. (R. pg. 150) Mr. Parra was taking care of the children and giving them what they needed, their clothes, food and everything. (R. pg. 151) Ms. Pettway stated that Mrs. Parra and Tommy Breland moved into a camper trailer (r. pg. 151) off Floweree Road in Vicksburg, Mississippi. (R. pg. 151) Ms. Pettway stated that after the separation Mr. Parra did everything for his children. He even moved his sister from California to babysit while he worked. (R. pg. 151-152) Ms. Pettway stated that Mr. Parra was a great father and provided the care for the children, both physical and spiritual needs. (R. pg. 152) Ms. Pettway stated that the children had a very close emotional tie to their parents. (R. pg. 152) Ms. Pettway stated that they loved both of them. Ms. Pettway stated that she knows the moral fitness of Mr. Parra and he is morally fit to have the custody of the children. Ms. Pettway stated that her step-sister, Mrs. Parra, used to have good morals, but she is not a very moral person anymore. (R. pg. 153) Ms. Pettway stated that Mrs. Parra and her boyfriend, Tommy Breland, bought a house together. (R. pg. 153) Ms. Pettway stated that Tommy Breland was not a good person at all. (R. pg 154) Regarding the *Albright* Factor

willingness and capacity to provide the primary care of the children, Ms. Pettway stated that she knew that Paul was the person most credible to provide such care. Ms. Pettway had seen him in his actions as a father for seven or eight months. (R. pg. 156-157) Ms. Pettway stated that Mr. Parra was there for the children, takes them to church, takes them to the store where they buy things, kids were making straight A's in school, getting their homework and getting cared for and watched over. (R. pg. 157)

In direct examination of Mrs. Parra she stated she and Mr. Breland purchased a home together, which home had five bedrooms. Mrs. Parra stated that she was capable of caring for the children. (R. pg. 196-197) In Mrs. Parra's case in chief Mrs. Parra stated that she was an adulterer. She stated that she committed adultery on her husband with Tommy Breland and that her husband was right. Mrs. Parra stated that she had an SDT or venereal disease and that the venereal disease came from Tommy's girlfriend, Michelle, before Mrs. Parra got with Tommy Breland, Jr. (R. pg. 199)

ARGUMENT

THAT THE LOWER COURT DID NOT COMMIT ERROR FOR THE FAILURE TO MAKE FINDING OF FACT AND CONCLUSION OF LAW

Mr. and Mrs. Parra, the Appellant and Appellee herein, were granted a divorce by the Chancery Court of Warren County, Mississippi, on the 21st day of October, 2009. The Court awarded the custody of the three (3) minor children of the parties to Paul William Parra, the Appellee herein. The Court in rendering the Judgment reserved the right to require briefs from the attorneys and make a finding of fact and conclusion of law. On the 26th day of October, 2009, Appellant Parra filed a Motion for Rehearing. Among the requests made by the Appellant of the Court to reconsider were the following:

> Based upon the evidence adduced at trial the application of the Albright Factors requires that primary physical custody of the minor children of the parties should have been granted to the Defendant/Appellant herein with the Plaintiff/Appellee herein being awarded reasonable rights of visitation.
>
> The Defendant/Appellant learned post trial that the Plaintiff/Appellee herein is planning to move the minor children to the State of California in his continuing efforts to destroy the relationship between the Defendant/Appellant and the minor children. Therefore, it is in the best interest of the children that the Court reconsider this matter.
>
> That the provisions of the Final Judgment taken as a whole place a financial burden on the Defendant/Appellant herein in that she cannot possibly fulfill. Further, the best interest of the children in this case require that the children be placed in the physical custody of the Defendant/Appellant herein with reasonable rights of visitation awarded to the Plaintiff/Appellee herein and the child support in the amount of $286.00 per month awarded to the Defendant/Appellant.

Upon the Court receiving the testimony from the Appellant and the argument of counsel, the Court denied the Motion for Rehearing and let stand the original Court Order.

The Appellant in the case, through her attorney, failed to request the lower Court to make finding of facts and conclusions of law. That by virtue of the Appellant not making such request for

finding of facts and conclusions of law, the Appellant waived such request and therefore the lower Court was not error for not making finding of fact and conclusions of law.

That this Court regarding the issue of failure to make finding of facts and conclusions of law, has relied on **Rule 4.01** of the Uniform Chancery Court Rules as follows:

> In all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the Court Reporter for record and called to the attention of the Chancellor.

and Rule 52, M. R. C. P. as follows:

> **(a) Effect.** In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.

In the instant case the Appellant fails to follow Rule 4.01 of the Mississippi Rules of Chancery Practice and Rule 52 of the Mississippi Rules of Civil Procedure. Appellant cannot now request the Court to set aside the verdict of the lower Court for the failure of Appellant to follow the legal procedures in law to protect the rights of Appellant. At no time did Appellant enter any written motion, or verbally, in the argument before the lower Court to make specific findings of fact and conclusions of law. Therefore, the Appellant has waived her right to request the Court to overturn the lower Court's decision.

In the case of *Lowery v. Lowery*, 657 So. 2D 817 (Miss. 1995), this case pointed out that Section 11-5-87 of the Mississippi Code Annotated was repealed in 1991 and Rule 4.01 of the Chancery Practice was amended. Rule 52 of the Mississippi Rules of Civil Procedure provided the words may and shall upon the request of any party to the suit make a finding of fact and conclusions of law. At no time did Appellant or her attorney make any motion in the lower Court requesting the lower Court,

pursuant to Rule 4.01, supra, and Rule 52 to make findings of fact and conclusions of law.

In the case of *Morreale vs. Morreale*, 646 So. 2D 1264, the Court stated as follows:

> Martin contends that his attorney was not allowed to object at the September 5, 1990, hearing which approved and confirmed the sheriff's report. He also argues that the chancellor refused to hear any testimony, evidence, argument, or even any statement by his attorney or him. Pursuant to Miss.Code Ann. § 11-5-103 (1972), which states that "the Court shall proceed to make a decree confirming the sale, unless good reason be shown to the contrary", Martin claims that a party has a right to object and be heard. In addition, he argues that the chancellor failed to make any findings of fact according to Miss.R.Civ.P. 52(a) which provides that "[i]n all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly."
>
> ***1270** To the contrary, Martin offered no testimony, evidence, argument or statement, and, in fact, when asked if there was any testimony or evidence to be presented, he responded with a negative reply. Martin did have a right to file an objection to the confirmation proceeding had he so desired. However, there was no objection filed with the court. Neither party asked that the chancellor make its findings of fact and conclusions of law separately, and, accordingly, Martin should not now be heard to complain of their absence. The only authority Martin presents is Tricon Metals & Services, Inc. v. Topp, 516 So.2d 236 (Miss.1987), wherein we remanded a case to the chancery court to make findings of fact separately from its conclusions of law. However, this case is misplaced as authority for Martin because we said:
>
> [I]n cases of any complexity, tried upon the facts without a jury, the Court generally should find the facts specially and state its conclusions of law

thereon.

> As in other areas, we will not interfere with a trial court's exercise of its discretion unless that discretion be abused. Where, however, a case is hotly contested and the facts greatly in dispute and where there is any complexity involved therein, failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion.
>
> Tricon Metals & Services, Inc., 516 So.2d at 239. The contempt case pending before the lower court was simple, and there was no need for special findings of facts and conclusions of law in the absence of request by either party. Since there was no such request made, there is no error.

In distinguishing the Morreale case, supra, with the facts adduced in the case before the Court, there was no request made by either one of the parties to make findings of facts and conclusions of law. There was no oral motion or written motion or any evidence of any request by either of the parties for the Court to make findings of facts and conclusions of law. The Appellant, based on the facts of the case at bar, cannot now find fault with the lower Court in failure to make findings of facts and conclusions of law when the Appellant failed to make such request in a timely manner as required by the applicable laws of the State of Mississippi and therefore, the argument that the Court did not make findings of facts and conclusions of law has no merit.

The Appellant asked the Court to reconsider the ruling of the lower Court based on the testimony and evidence adduced at the hearing of the case on its merits in the lower Court. At no time did Appellant ever request the lower Court to make a finding of fact and conclusions of law. This Court, in the case of *Louk v. Louk*, 761 So.2d 878, (2000), addressed the issue of findings of facts and conclusions of law and stated as follows:

> Patty argues that the Chancellor did not make sufficient findings or a reasoned explanation for his

> decision to grant unsupervised, as opposed to supervised, visitation to John, given the allegations of John's abuse towards his family. Patty believes that the Chancellor should have entered specific findings of fact on the issue. Mississippi Rule of Civil Procedure 52(a) provides: "In all actions tried upon the facts without a jury the court may, and shall upon the request of either party to the suit or when required by these rules, find the facts specifically and state separately its conclusions of law thereon and judgment shall be entered accordingly." The Chancellor, therefore, has discretion to make specific findings absent a request by the parties. In this case, Patty did not make a request for findings of fact and conclusions of law.
>
> Patty cites Tricon Metals & Servs., Inc. v. Topp, 516 So.2d 236 (Miss.1987), where this Court held that trial courts should enter specific findings of fact and conclusions of law in matters of great complexity, even absent a request from the parties involved. In *Tricon Metals,* the Court stated, "Where, however, a case is hotly contested and the facts greatly in dispute and where there is any complexity involved therein, failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion." *Id.* at 239. While it is arguable that any matter regarding child custody is a matter of great complexity, in this case the facts do not seem to be in great dispute. Dr. Smallwood testified through affidavit that supervised visitation was unnecessary. Patty offered no evidence, other than her own allegations of events that occurred before John and the childrens' counseling with Dr. Smallwood. No contrary expert opined that John posed a physical danger to his children and that supervised visitation was needed.

The Court, in this case, in addressing the issue of finding of fact and conclusions of law cited the case of *Tricon Metals & Services, Inc. vs. Topp*, 516 So.2d 236 (Miss. 1987), which added an additional twist to the issue of finding of fact and conclusions of law. In the Tricon case, supra, this Court stated that where there are issues of great complexity even absent a request from the parties

involved requesting the Court to make findings of facts and conclusions of law, the lower Court when there are highly contested issues and factors greatly in dispute and the lower Court fails to make findings of fact and conclusions of law, then the lower Court has abused its discretion. Such is not the case in this case now before the Court. There were issues of custody that were contested, but the Appellant offered no testimony or evidence in the lower Court that warranted the finding that there was complexity in the case before the Court. The testimony was very straight forward in the instant case with the *Albright* Factors having been considered by the parties in placing evidence before the Court which allowed the Court to view the witnesses in the courtroom setting and to make a decision as to the truthfulness of each of such witness and make a decision based on the evidence and testimony in the Court. At no time was the issue of custody a complex issue that demanded that the Court on its own motion make finding of facts and conclusions of law. In the temporary hearing the Appellant offered no testimony on her behalf that would have changed the outcome of the lower Court order. Appellant testified that she was a resident of Sicily Island, Louisiana. (R. pg. 10) Appellant testified that she had moved to Sicily Island with Tommy Breland, her boyfriend, after leaving her husband. (R. pg. 10) Upon asking if her acts were immoral in running off with another man with whom she was not married, Appellant responded yes, it is immoral. (R. pg. 10) Appellant stated that she did not want her children to live in Sicily Island, Louisiana. (R. pg. 11) Appellant testified that she left her husband and went to live with her lover and paramour in Sicily Island. (R. pg. 11) Appellant had been seeing Tommy Breland, her lover, for about a month without the knowledge of her husband. (R. pg. 13) The immoral situation which the Appellant found herself in caused the lower Court to place the custody of the parties children in Appellee. There are no complex issues or facts in dispute in the case at bar and the failure of the lower Court to make finding of facts and conclusions of law is not an abuse of discretion by the trial Judge.

In the case of *Blevins vs. Bardwell*, 784 So.2d 166, (Miss. 2001), the Court speaking as to

finding of facts and conclusions of law stated as follows:

> Dawn maintains that Adam cannot now complain as to any lack of specific findings of fact and conclusion of law because Adam's trial counsel did not make a specific request asking for such. Dawn refers to M.R.C.P. 52(a) and Rule 4.01 of the Uniform Chancery Court Rules which are as follows:
>
> Rule 52 Findings by the Court; (a): Effect. In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately in its conclusions of law thereon and judgment shall be entered accordingly.
>
> M.R.C.P. 52(a).
>
> Rule 4.01 of the Uniform Chancery Court Rules titled "Findings by the Court": In all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the Court Reporter for record and called to the attention of the Chancellor.
>
> U.C.C.R. 4.01. Dawn believes that because Adam failed to request specific findings of fact and conclusions of law, contrary to what occurred in *Patout* where such a request was made, that the matter should be considered waived. Patout, 733 So.2d at 772-73.
>
> The record clearly indicates that the Chancellor properly considered the mental and physical health of both parents and that her decision was based on the factors as outlined in *Albright.* Because of this, and the fact that Adam failed to request specific findings of fact and conclusions of law, this Court is hard pressed to find that the Chancellor's decision is manifestly wrong, clearly erroneous, or the result of the application of an erroneous legal standard. This Court has stated that child custody matters are solely within the Chancellor's discretion and we find that there was no abuse of this discretion in the Chancellor's determination of the health of the parents.

In the instant case the Appellant filed a Motion for the Court to reconsider its opinion, however, the Appellant failed to file a motion for the Court to make a finding of fact and conclusion of law. Failure of the Appellant to file the appropriate motion requesting the Court to make a finding of fact and conclusion of law in such instance should be considered waived.

In the case of *Mississippi Department of Transportation, State of Mississippi vs Susan Trosclair and Bridget Trosclair*, 851 So2d 408 (Miss. 2003), the Court addressed the issue of finding of facts and conclusions of law and stated as follows:

> VII. DID THE TRIAL COURT ERR WHEN IT FAILED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW?
>
> Mississippi Rules of Civil Procedure Rule 52(a) specifically states:
>
> In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.
>
> In Tricon Metals & Services, Inc. v. Topp, 516 So.2d 236, 239 (Miss.1987), the court stated that in cases of any significant complexity the trial court generally should find the facts specially and state separately its conclusions of law. However, the case sub judice is far from complex, and since the court did not make findings on its own accord, the only other option would be upon the request of any party to the suit.
>
> The Mississippi Supreme Court stated that when a party requests specific findings of fact and conclusions of law in its post trial motions, it is error for the ***415** trial court to fail to make such findings. Patout v. Patout, 733 So.2d 770, 773 (¶ 17) (Miss.1999). After a thorough examination of the entire record and an even closer look at the defendants' post-trial motion, we fail to find any request made for specific findings of fact and conclusions of law.

In the case of *Patout v. Patout*, 733 So.2d 770 (Miss. 1999), the Court addressed the issue of finding of facts and conclusions of law and stated as follows:

> The Mississippi Rule of Civil Procedure provides a method whereby any party may request the specific basis on which a chancellor made a ruling. Rule 52(a) provides:
>
> ***773 Effect.** In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.
>
> M.R.C.P. 52(a). In addition, Rule 4.01 of the Uniform Chancery Court Rules titled "Findings by the Court" provides:
>
> In all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the Court Reporter for record and called to the attention of the Chancellor.
>
> U.C.C.R. 4.01.
>
> In Lowery v. Lowery, 657 So.2d 817 (Miss.1995), we looked to Rule 52(a) of the Federal Rules of Civil Procedure for guidance. *Id.* at 819. Federal case law indicates it is proper for the appellate court to vacate and remand a judgment when the lower court has failed to make findings of fact and conclusions of law as requested. *Id.* (*citing* Liddell v. Board of Educ., 20 F.3d 324 (8th Cir.1994); In re Incident Aboard D/B Ocean King, 758 F.2d 1063, 1072 (5th Cir.1985)). However, we also noted in *Lowery* that appellate courts may decide such custody issues without further findings when possible. Lowery, 657 So.2d at 819 (*citing* Matter of Holloway, 955 F.2d 1008, 1015 (5th Cir.1992)). In *Holloway,* the court found it was able to decide on appeal since the underlying facts

were undisputed, there were no credibility resolutions to be made, and there was no view of the record that would permit a different finding than the one the lower court reached.

In the instant case, Mr. Patout requested specific findings of fact and conclusions of law in his Motion to Alter or Amend or for a New Trial. When the chancellor denied this motion, he failed to make the findings Mr. Patout requested.

Ms. Patout suggests the reason that chancellor failed to make these findings was that he was misled by counsel for Mr. Patout. After the Motion to Alter or Amend or for a New Trial was filed, a property settlement agreement was entered by the parties. Counsel for Mr. Patout then sent a letter to the chancellor requesting the following:

It appears that the parties have now entered into an agreement on all issues except custody.

I would request that an amended Judgment be entered by the Court taking into consideration the issues amicably resolved in the attached agreement and Mr. Patout's position as set forth in our arguments and testimony taken pursuant to out Motion to Alter or Amend.

In his oral argument on the motion, counsel for Mr. Patout did not mention his request for findings of fact and conclusions of law. Ms. Patout suggests the failure of counsel to point out the remaining request for findings misled the chancellor and suggests chancellors should not be required to "read the pleadings with a microscope."

In as much as the Chancellor was required by our rules to make such findings and conclusions, he was in error. It does not appear that the chancellor in this case deliberately refused to make the findings requested by Mr. Patout. In fact, it seems the mounting paperwork and counsel for Mr. Patout's admitted general motion without further request for such findings led the chancellor to overlook this

obligation. As Mr. Patout notes and federal case law instructs, Rule 52 is not jurisdictional. We can decide a case where further findings of fact are unnecessary.

The position of the Appellant that the lower Court did not make a finding of fact and conclusion of law is without merit. The opinion of the lower Court should be affirmed by this Court.

THE LOWER COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO RECONSIDER WHEN APPELLEE AND THE CHILDREN MOVED TO THE STATE OF CALIFORNIA

That at the time of the hearing of the case on its merits there was no issue as to whether or not the minor children of the parties were moving from the State of Mississippi to the State of California.

Appellant, by her own admission, in her Motion for the Court to Reconsider offered no new facts that would bolster the position of the Appellant. Appellant testified that she was divorced from Appellee pursuant to a Order of October 15, 2009. (R. pg. 238) Appellant, when asked if Appelle gave any indication that he was going to take the children to California, responded by saying, no sir, he did not. (R. pg. 250)

Appellant raises the issue of the children's move to the State of California for the first time in her Motion to Reconsider. Appellant claims the move of the children to California was without jurisdiction or permission of the Court contrary to the facts enumerated in *Albright*. Appellee was under no constraint to not move to California. The lower Court decided all issues and Appellee was granted custody of the minor children based on the facts before the Court. There is no question of the moral atmosphere the Appellant would have subjected the children had she been granted custody of the minor children. The Appellant's position that the children's move to California was without justification and without permission of the Court and contrary to the facts enumerated in *Albright* is without merit and should not be considered. The testimony adduced at trial was as follows:

Q: Okay. During the trial at which you were present, did Mr. Parra give testimony about he proposed to raise these children?

A. Yes sir, he explained you know, that he would take them--make sure they went to school. And you know, the same thing that I explained, take care of their basic needs, make sure that they were taken care of. (R. pg. 250)

Q. Did he give any indication that he was going to take these children to California? (R. pg. 250)

A. No sir, he did not. (R. pg. 250)

Q. When did he go? (R. pg. 250)

A. He left on November 11th. (R. pg. 250)

Q. Okay. When did you first learn that he was in fact going to California? (R. pg. 251)

A. Well, I had heard some rumors from my family members and I had called and asked him and he denied it to me. But I actually learned it was true on November 11th, when he called me in en route to California. (R. pg. 251)

Q. Did he deny that he was moving anywhere? (R. pg. 257)

A. He wasn't asked if he was moving, like in the courtroom that day. I don't believe he was asked. I don't believe it was ever brought up, to my knowledge, if he was leaving. But I mean he wanted the home to raise the kids in. (R. pg. 257)

Q. And there' s no restrictions on his movement at all, are there? (R. pg. 261)

A. There were none at that time, no. (R. pg. 261)

Q. There's no restrictions on your movement, are there? (R. pg. 261)

A. No, there's not. (R. pg. 261)

In the case of *Brewer v. State of Mississippi*, 819 So.2d 1169 (Miss. 2001), the Court, in addressing a Motion for Reconsideration stated:

> The State responds that Brewer is attempting to raise a totally new claim, which was not presented in his original ***1175** post-conviction motion and that this case is still open on only one issue-the DNA test results. Furthermore, the State argues that this case is pending on a motion for rehearing, and this Court has held for years that one cannot raise new claims in a motion for rehearing. *See* Irving v. State, 441 So.2d 846, 854 (Miss.1983) ("The issue may not

> now be raised for the first time on a petition for rehearing and it is procedurally barred."), (citing Edwards v. Thigpen, 433 So.2d 906 (Miss.1983); Wheat v. Thigpen, 431 So.2d 486 (Miss.1983)). As a result, the State asserts that this claim should be dismissed with prejudice.

That the testimony offered by the Appellant in her Motion for Reconsideration was not raised at the hearing of the case before the lower Court. Appellant, by her own admission, stated that the issue of the Appellee moving to the State of California was not mentioned during the trial and it was only after the Appellee moved to the State of California that Appellant raised the issue of moving to California for the first time.

Appellant has other avenues to pursue her request to overturn the ruling of the lower Court such as modification of the lower Court order. To now allow Appellant to raise issues that were not before the lower Court at the time of the lower Court's decision does not have any merit and, therefore, the lower Court in ruling on the Motion for Reconsideration and dismissing same was within the authority of the lower Court.

There are a number of cases that address the issue of relocation of the parties from one State to another. Out of an abundance of caution Appellee will address the issue of moving from one State to another. Appellee suggests to the Court that the issue of the move of Appellee to California with his children has no merit, in that, it was not timely raised during the course of the trial and could not be raised in the Motion for Reconsideration as same was not raised in the trial of this case nor on its merits.

In the case of *Marter v. Marter*, 914 so.2d 743 (Miss. 2005), the Court on a Petition for Modification of Former Decree stated:

> We turn now to Mother's second argument that there was not substantial, credible evidence to support the chancellor's decision that a material change in

circumstances had occurred, since the original custody decree was issued, which adversely affected the welfare of the children. Mother argues that the chancellor erred in seemingly placing considerable weight on Mother and the children's relocation to Tennessee. Mother argues that this change in circumstances could not be considered because the parties had been aware of this possibility at the time of the initial custody determination. *See* Lambert v. Lambert, 872 So.2d 679 (Miss.Ct.App.2003) (a custodial parent's relocation without more is insufficient grounds for modification of child custody). The chancellor, however, found more than merely a previously contemplated relocation as Mother asserts and as was discussed in *Lambert.* The chancellor specifically noted in his opinion that the move to Tennessee did not justify a modification of the child custody decree. However, the chancellor did determine that the relocation precipitated an overall change in circumstances in the children's living conditions which had an adverse affect on the children's welfare.

Before proceeding to discuss the chancellor's specific findings, we recall that the standard of review regarding the chancellor's findings of fact is abuse of discretion. The chancellor found that, based on their relocation, Mother and the children had no extended family or friends in Tennessee; the children were repeatedly left at home alone for hours in a strange place; Lindsay's school grades dropped initially; Lorrin, age nine, was left home alone twice during stormy weather which frightened her; Lindsay, age thirteen, expressed a legally relevant desire to live with her father; and a licensed psychological counselor, who testified as an expert witness for Father, stated that in his opinion, Lindsay had been adversely affected by the consequences of the relocation. Before proceeding, we are mindful that the chancellor, as the trier of fact, hears the evidence first-hand and is in the best position to make the difficult decisions regarding the issues of witness credibility and the degree of weight to afford the various aspects of the evidence. Rogers, 791

So.2d at 826 (¶ 39).

> Mother further asserts that since many of the previously mentioned findings of fact had been rectified, the chancellor should not have considered them. Mother points the Court's attention to *Kavanaugh v. Carraway* [FN2] for the proposition that a change in custody is only legally proper when the totality of the circumstances display a material change in the overall living conditions in which the children are found which is likely to remain unchanged in the foreseeable future. *Kavanaugh,* however, is factually distinguishable from this appeal in that it involved a change in custody from the mother based on the mother having lived with her new husband for one month prior to their marriage. Kavanaugh, 435 So.2d at 698-99. The *Kavanaugh* court determined under the totality of the circumstances that the chancellor had erred in removing the children from the mother's custody solely based on the month long co-habitation; the Mississippi Supreme Court determined that the facts of that case failed to demonstrate a detrimental effect on the children. Kavanaugh, 435 So.2d at 701.

In the case of *Balius v. Gaines*, 908 So.2d 791 (Miss. 2005), this Court in ruling on a Petition for Modification of Former Decree stated:

> Regarding Gaines's move to California, the chancellor did not abuse his discretion in finding the move was not a material change in circumstances adversely affecting Jared. A custodial parent's move with the child to a distant location has been held to be a material change in circumstances but one that, without more, does not adversely affect the child to support a change in custody. Spain v. Holland, 483 So.2d 318, 321 (Miss.1986). The *Spain* court stated that "[w]e close our eyes to the real world if we ignore that ours is a mobile society. Opportunity and economic necessity transport perfectly responsible adults many miles from their homes." *Id.* We have recently applied *Spain's* holding that a custodial parent's move is not per se grounds for a change of custody, even when the move curtails the non-

> custodial parent's visitation rights. Lambert v. Lambert, 872 So.2d 679, 686 (¶ 28 (Miss.Ct.App.2003).
>
> A non-custodial parent's visitation rights are "legally irrelevant to the matter of permanent custody." Spain, 483 So.2d at 321. Balius raises no issue of an adverse effect of the move upon Jared beyond the adjustment of Balius's visitation rights. This issue is without merit.

In the case of *Pearson v. Pearson*, 11 So.3d 178 (Miss. COA 2009), the Court in speaking on a Petition for Modification of Former Decree with regard to moving from one location to another State states as follows:

> In addition to one parent moving out of state, this Court has found that a short move can also result in a material change in circumstances. *See* Rinehart v. Barnes, 819 So.2d 564 (Miss.Ct.App.2002) (father moved from DeSoto County, Mississippi to Cordova, Tennessee); Massey v. Huggins, 799 So.2d 902 (Miss.Ct.App.2001) (couple resided in Laurel, Mississippi during the marriage; mother moved to south Forrest County, Mississippi then to Petal, Mississippi; father moved to Natchez, Mississippi, then to Long Beach, Mississippi).
>
> The distance of the move is not dispositive as to whether a material change in circumstances has occurred; it is the effect the move has on the child and the custody arrangement that is dispositive. In each of the above cases, the chancellor or appellate court found that the move by one parent caused the custody arrangement to become impractical or impossible to maintain. In many instances, the parents shared joint legal and physical custody of the child prior to one of the parents moving. After one parent relocated, the custody arrangement became too difficult on the child and the parents to uphold.

In reviewing these cases and the totality of the circumstances same applies in that each case stands on its own facts and rulings. The thrust of each of such opinions regarding relocation of one of

the parties and the minor children is the effect that such move would have on the children moving from one location to another. In the instant case first, there is no proof in the record that the issue of the move to California by Appellee was ever addressed in any testimony received from the parties or by the Court. Secondly, there is no proof in the record offered by Appellant during the case which would have an adverse effect on the children. The record is silent as to any adverse effect on the children moving from the State of Mississippi to the State of California and therefore, the issue of the move from Vicksburg, Mississippi, to the State of California and a modification of the original Order of the Court is without merit.

The issue of relocation to the State of California is without legal basis and without merit for the reason that the first time the issue of relocation of Appellee was raised was in Appellant's Motion for Reconsideration and, further there is no proof of any immaterial fact that the move to California would not be in the best interest and welfare of the minor children of the parties.

Therefore, the issue of the relocation of the Appellee and the minor children is without merit and this Court should find that the issue raised by the Appellant regarding relocation of the minor children from the State of Mississippi to the State of California is without merit.

THAT THE LOWER COURT HAD SUFFICIENT TESTIMONY AND EVIDENCE TO DETERMINE THAT THE BEST INTEREST AND WELFARE OF THE MINOR CHILDREN SHOULD BE IN THE CUSTODY OF APPELLEE. AFTER CONSIDERING ALL OF THE TESTIMONY AND THE EVIDENCE AND FINDING THAT THE TOTALITY OF CIRCUMSTANCES AND PLACED SUCH CHILDREN IN THE CUSTODY OF APPELLEE WAS IN THE BEST INTEREST AND WELFARE OF SUCH MINOR CHILDREN. THE COURT CONSIDERED THE ALBRIGHT FACTORS AND TESTIMONY ADDUCED BY EACH OF THE RESPECTIVE PARTIES IN MAKING SUCH DECISION AND CONSIDERED SAME IN MAKING THE DECISION AS TO THE CUSTODIAL RIGHTS OF EITHER ONE OR BOTH PARTIES WITH THE MINOR CHILDREN.

It should be evident from the record that Mr. Parra is the proper parent to have the care, custody and control of the minor children which was awarded to him by the lower Court. The trial Judge did not make findings of fact and conclusions of law as such findings of fact and conclusions of

law were not requested by either one or both parties and therefore the lower Court made the decision concerning the best interest and welfare and custody of such children on the record. The trial Judge had an opportunity to view each of the witnesses in their capacity as a witness and to test the truthfulness of each of such witnesses and therefore made a decision based on the facts and evidence in the case before the Court.

The testimony of Mr. Parra and all of his witnesses indicated that Mr. Parra was the proper person to have the care, custody and control of the minor children of the parties and that Mr. Parra met all of the criteria insofar as the better parent for the minor children. The Court considered the *Albright* Factors and the testimony adduced from each of the witnesses in open Court and determined that Mr. Parra was the proper person to have the care, custody and control of the minor children of the parties.

In the case of *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983), the Court reaffirmed the rule that the polestar consideration in child custody cases is the best interest and welfare of the children and the Court set forth certain factors to be considered by the Court in making such decisions as to the custody of the minor children as follows:

> Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

It is evident from the record that Mr. Parra is the proper person to have the care, custody and

control of the minor children of the parties for the reasons that throughout the course of the marriage that he was the main contributor to the children's financial interest, as well as, to their everyday needs and met the criteria of the factors in the *Albright* case. The lower Court considered the factors of the *Albright* case and is the trier of fact and made such decision based on the testimony which was received in open Court and produced by each of the respective parties.

In the case of *Blevins v. Bardwell,* 784 So.2d 166 (Miss. 2001), the Court speaking as to the authority of the lower Court stated as follows:

> It is this Court's inclination to rule that the order was permanent, however, deference should be given to the Chancellor and the wide discretion she enjoys as finder of fact in matters such as this. This Court has stated:
>
> a chancellor's decision cannot be disturbed "unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous, or an erroneous legal standard was applied." Madden v. Rhodes, 626 So.2d 608, 616 (Miss.1993) (citations omitted). A chancellor sitting as a finder of fact is given wide discretion.
>
> Griffin v. Campbell, 741 So.2d 936, 937 (Miss.1999).
>
> [4] ¶ 13. Finally, and of greatest importance as this is a child custody matter, we must defer to the polestar consideration in every child custody case, the best interests of the child. Albright v. Albright, 437 So.2d 1003, 1005 (Miss.1983).

CONCLUSION

Based on the record of this case and the testimony received by the lower Court, it is evident that the lower Court made the right decision in awarding the care, custody and control of the minor children to Mr. Paul Parra. The record reflects the *Albright* factors that were weighed by the Court in making

such decision as to the custody of such children and therefore the Court was the best judge of the testimony and evidence and witnesses and made such decision based on the testimony and evidence in conjunction with the *Albright* factors which were testified to by all of the witnesses in the case.

The issued raised by the Appellant in the lower Court that the Judge did not make a finding of fact or conclusion of law is fraught with problems on the part of the Appellant in that she did not request finding of facts and conclusions of law and relied on the Judge to make a decision based on the testimony and evidence and the *Albright* factors testified to by the parties in the case.

The Appellant, in filing a Motion to Reconsider, attempted to place new evidence before the Court, which such testimony adduced at the Motion to Reconsider was not ruled on by the trial Judge during the course of the original action before the Court. It was only after Mr. Parra removed himself from the State of Mississippi to the State of California that the issue was raised as to whether or not he should remove the children from Mississippi to the State of California. The issue of the move of Mr. Parra to the State of California is a moot issue as such statements made by Mrs. Parra were not included in the original hearing of this case on its merits and therefore the lower Court did not have an opportunity to rule on the issue.

The Court ruled on the issue of the best interest and welfare of the children by finding that Mr. Parra was the proper person to have the care, custody and control of the children and the Court was the better judge of the witnesses and testimony before the Court and therefore made the right decision in awarding such minor children to Mr. Parra.

RESPECTFULLY SUBMITTED,

PAUL WILLIAM PARRA

BY: _____

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CERTIFICATE OF SERVICE

I, Travis T. Vance, Jr., Attorney for Appellee, do hereby certify that I have this day hand delivered a true and correct copy of the above and foregoing Brief of Appellee to the following:

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THIS the 30 day of September, 2010.

TRAVIS T. VANCE, JR.