

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CLIFFORD NOLAN JACKSON**

**APPELLANT**

**VERSUS**

**NO. 2010-CA-00849**

**CHARITY LYNN JACKSON**

**APPELLEE**

**APPEAL FROM THE CHANCERY COURT  
OF UNION COUNTY, MISSISSIPPI  
CAUSE NO. CV2008-000182-73-H**

**BRIEF OF THE APPELLEE**

**LUTHER P. CRULL, JR.  
ATTORNEY AT LAW  
110 FIRST STREET  
P.O. BOX 2181  
GRENADA, MS 38902-2181  
(662) 227-0900  
(662) 227-0902 (FAX)  
MSB NO. 7911**

**ATTORNEY FOR APPELLEE**

**ORAL ARGUMENT NOT REQUESTED**

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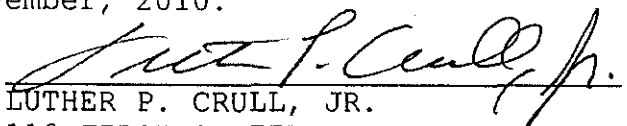
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

THE UNDERSIGNED counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable John A. Hatcher, Jr.  
Chancellor
2. Clifford Nolan Jackson  
Appellant
3. Joe M. Davis, Esq.  
Attorney for Appellant
4. Charity Lynn Jackson  
Appellee
5. Luther P. Crull, Jr.  
Attorney for Appellee

THIS THE 16<sup>th</sup> day of November, 2010.



LUTHER P. CRULL, JR.  
110 FIRST STREET  
P.O. BOX 2181  
GRENADA, MS 38902-2181  
(662)227-0900  
(662)227-0902 (FAX)  
MSB NO. [REDACTED]  
Attorney for Appellee

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### **REFERENCES IN BRIEF TO PARTIES**

Appellant Clifford Nolan Jackson shall be hereinafter referred to as "Cliff". Appellee Charity Lynn Jackson shall be hereinafter referred to as "Charity".

### **REFERENCES IN BRIEF TO TRIAL TRANSCRIPT, RECORD EXCERPTS and TRIAL EXHIBITS**

References herein to the trial transcript shall be designated by page as [T-\_\_]; reference herein to Appellee's record excerpts shall be designated by page as [R-\_\_]; and reference herein to trial exhibits shall be designated as [Exhibit-\_\_].

## **STATEMENT OF THE CASE**

This is a child custody case.

This case was initiated by Charity filing her Complaint for Divorce, Temporary Hearing and Other Relief against Cliff on May 22, 2008, before the Union County Chancery Court. Cliff filed responsive pleadings to Charity's complaint, including a Counterclaim for Separate Maintenance and a Request for Temporary Relief.

A temporary hearing was held on August 4, 2008. Cliff was awarded temporary custody of the children primarily for two reasons, i.e. Charity was working the night shift (7:00 P.M. to 7:00 A.M.) as a registered nurse and Charity and the two girls were living with Charity's mother approximately forty-five (45) minutes from the girls' school. The Court specifically held that the temporary order was not *res judicata* on the child custody issue.

Subsequent to the temporary hearing Charity retained new counsel who represented her at the final hearing. Discovery was propounded and answered by both parties.

The case was set for trial on April 14, 2010. On the day of trial, the parties filed their Joint Motion to Withdraw and on said motion the Court entered its order adjudicating withdrawn the answers, affirmative allegations, contest and denials filed by the parties and the fault ground for divorce alleged by Charity.

The parties then filed their Consent Agreement pursuant to MCA § 93-5-2(3) whereby the parties consented to entry of a divorce on

the ground of irreconcilable differences and submitted seven (7) issues for adjudication by the Chancellor at trial. During the course of the trial, the parties announced that they had settled issues 2-7 and their agreement on said issues was dictated into the record, approved by the parties, and then approved by the Chancellor.

The sole issue remaining for adjudication was issue one (1) which is set forth as follows: All custody, visitation, medical insurance, educational expenses, federal and state tax dependency and support issues.

During the trial, both parties made application to the Court on the record that the Chancellor consider as a custody alternative the award of joint physical and joint legal custody of the children to the parties.

At the conclusion of the proof, the Chancellor took the case under advisement for subsequent entry of written opinion. On April 26, 2010 the Chancellor filed his seventeen (17) page written opinion and Judgment. Thereafter on May 4, 2010, Cliff filed his Motion for Reconsideration and/or Clarification of Opinion and Judgment. The Motion for Reconsideration did not request the Chancellor to reconsider his joint custody award. On May 13, 2010, the Chancellor filed his Corrected Opinion and Judgment for Divorce - Irreconcilable Difference.

The Chancellor awarded to Charity and Cliff joint physical and joint legal custody of the two girls of the parties, ages 7 and 5.



The Chancellor made a detailed analysis of the Albright factors. Among other things, the Court found that Charity had improved her situation in that she was now working the day shift, 7:00 A.M. to 7:00 P.M., and that she had purchased a new home and was now living five (5) minutes from the girls school.

From the Corrected Opinion and Judgment, Cliff filed his appeal.

### **STATEMENT OF FACTS**

Charity and Cliff were married on October 1, 1993. [T-17] [R-28] Charity and Cliff separated on May 2, 2008. [T-18] [R-29] This was Charity's first marriage. [T-17] [R-28]

Two (2) daughters were born to the marriage and the parties, namely, Anna Grace Jackson, age 7, born on July 21, 2002; and Molly Elizabeth Jackson, age 5, born on December 20, 2004. [T-17] [R-28]

At the time of trial Charity was 36 years old. [T-17] [R-28]

Charity earned her license as a registered nurse in the year 2000. Prior to becoming a registered nurse Charity worked as a nursing assistant for three years at the Baptist Memorial North Mississippi Oxford Hospital ("Oxford Hospital") and worked there while attending nursing school. [T-18] [R-29]

At the time of trial, Charity had worked continuously at the Oxford Hospital for thirteen (13) years. [T-18] [R-29] Charity's nursing license had never been suspended or revoked and Charity had never been subjected to discipline by the nursing board. [T-18] [R-29]

Pauline McCullar is the nurse manager of the Women's Pavilion at the Oxford Hospital. [T-6] [R-20] Except for approximately one year when Charity worked at the endo department, Ms. McCullar worked with Charity and was at time of the trial Charity's supervisor. [T-7] [R-21] Ms. McCullar testified that Charity was very dependable and stable and that her evaluation's were

excellent. [T-8] [R-22] Charity had not been the subject of any disciplinary action and that Charity had good job security at the hospital. [T-9] [R-23] Charity is not subject to call in or on call situations. [T-9 & 10] [R-23 & 24] Charity was currently working in the newborn nursery where she did an excellent job taking care of the babies and there was probably not anybody better working there. [T-8] [R-22]

Charity's work schedule is 7:00 A.M. to 7:00 P.M. three days per week, i.e. one week Monday, Tuesday and Saturday and the next week Sunday, Wednesday and Thursday. [T-20] [R-30] Friday work day is optional. [T-20] [R-30]

Charity worked some on the weekends prior to the separation. Cliff stated that he could not take care of the two girls by himself so Charity took another job at the Oxford Hospital so she would be home on the weekends to care for the girls. [T-20 & 21] [R-30 & 31]

Charity has hypothyroidism and takes medication for said condition. The thyroid condition does not cause Charity any impairment and does not affect her ability to function and to care for her two daughters. [T-21 & 22] [R-31 & 32]

Charity took antidepressant medication for two years prior to the separation. After the separation when she got away from Cliff Charity quit taking the antidepressant medication on advise of the same doctor who had originally prescribed the same. [T-22] [R-32]

Nothing about Charity's physical or mental health impairs Charity's ability to perform her job and to care for her children.

**[T-22] [R-32]**

Charity presently owns and resides in a new three bedroom-two bath house purchased by her after the separation on Highway 30 west of New Albany. Both girls have their own bedrooms which each girl individually decorated. **[T-23] [R-33]**

Anna Grace is in the 2<sup>nd</sup> grade and Molly is in pre-k at the West Union School. Charity's new house is five (5) minutes from said school and the two girls will continue attending said school.

**[T-23] [R-33]**

Charity's house is twelve (12) minutes from the former marital residence where Cliff lives. **[T-24] [R-34]**

Charity breast fed both girls. Cliff never got up with the girls at night. **[T-25] [R-35]** Cliff did not assist in the care of the girls on a routine basis. Charity did substantially all of the routine care for the girls. **[T-26] [R-36]** Charity took the girls to birthday parties. Cliff said men were not supposed to take kids to birthday parties. **[T-26] [R-36]**

Charity was involved with the church and the children's church activities. Charity taught the girls Sunday school classes (ages 2-5) and Charity taught the girls Wednesday night church classes.

**[T-26 & 27] [R-36 & 37]** Charity took the girls to church on Sunday morning, Sunday night and on Wednesday night. **[T-26] [R-36]**

Charity helped in the church nursery. **[T-27] [R-37]**

After the separation, Charity and the girls have been attending church at Keownville Baptist Church. **[T-11] [R-25]** Charity and the girls have been attending church there for 2-3 years.

Charity attends church on Sunday and Wednesdays when she's not working. Charity brings the girls when she has them.

Charity comes to church on Wednesday nights sometimes without the girls.

The girls are nice and neat at church. **[T-12] [R-26]** Charity's mother attends the Keownville Baptist Church. **[T-13] [R-27]**

Charity took the girls to the doctor and provided medical care for the girls. **[T-27] [R-37]**

Exhibit 4 is a photograph of Charity and the two girls, Anna Grace and Molly. **[T-28] [R-38] [Exhibit-4] [R-70]**

Since the temporary hearing when Cliff was awarded temporary custody, Anna Grace has gained twenty (20) pounds. She did weigh fifty-six (56) pounds and now weighs seventy-six (76) pounds. **[T-28] [R-38]** Exhibit 5 is a photograph of the girls which shows Anna Grace's dramatic weight gain. **[T-29] [R-39] [Exhibit-5] [R-71]** Charity has been taking Anna Grace to the gym and working with her diet due to her weight gain. **[T-31] [R-40]**

Before the separation, Cliff would not spend time with the girls. Charity bathed and dressed the girls and put them to bed.

**[T-31] [R-40]**

Cliff deer hunted November-January several days each week. Cliff would go to deer camp sometimes 3-4 days at a time. Charity took care of the children while Cliff deer hunted. **[T-32] [R-41]**

When Charity was working on Saturdays, Cliff took the girls to his mother for his mother to care for the girls at a time when Cliff should have been providing their care. **[T-32] [R-41]**

Cliff expected his supper to be on the table about 5:00-5:30 P.M. each day. Before work, Charity would get up at 4:30 A.M. and cook Cliff's supper while Cliff was sleeping. **[T-32 & 33] [R-41 & 42]**

At the separation, Charity took the two girls with her and moved to her mother's house. **[T-34] [R-43]**

At the time of the temporary hearing on August 4, 2008, when Cliff was awarded temporary custody, Charity was working the night shift, 7:00 P.M. to 7:00 A.M., and Charity is now working the day shift 7:00 A.M. to 7:00 P.M. At the time of the temporary hearing, Charity and the two girls lived with her mother forty-five (45) minutes from the girls school and Charity now lives five (5) minutes from the school. **[T-35] [R-44]**

Charity exercised all visitation given to her by the temporary order. **[T-37] [R-45]** Charity requested additional visitation from Cliff and Cliff would refuse the request for additional time by telling Charity to look at your papers. **[T-38] [R-46]**

Photographs 6(a), (b), and (c) show the girls playing on a slip and slide by the pool. This was the first time the girls had been out by the pool. Charity used sunscreen on the girls which was removed by the water. The girls were outside for approximately thirty (30) minutes. **[T-40] [R-47]**

Photographs 7(a), (b), and (c) show the condition of the child Molly's stockings when Charity picked the girls up from school. Charity gave Molly a bath and changed her into her pajamas. Charity returned Molly's clothes and stockings to Cliff. **[T-42-44] [R-48-50]**

Charity did not have a boyfriend and was not seeing anybody at the time of separation, May 2, 2008. **[T-47] [R-51]** Charity did not start seeing somebody until a year later in approximately May 2009. **[T-48] [R-52]**

Charity had sexual relationships with three men during separate periods from and after May 2009, one year after the separation.

The first man she saw during the period from May to August, 2009. The only time this man was around the children was when he came to Charity's house on two occasions to jump off her car battery and to repair a hose break on her above ground swimming pool. The second relationship was from September to December 2009. Charity had sex with this man two (2) times. This man was a friend who also had little girls and the kids would play together. He was a friend from high school days. The third relationship began

approximately October 2009. He has not been around Charity's children. Charity has not engaged in sexual relations with any of these men while having custody/visitation with the girls. None of the men have spent overnight with Charity when she had custody/visitation with the girls. The children were not present when Charity engaged in sexual intercourse. The children were in Cliff's custody when she engaged in relations with the men. The children were not exposed to Charity's relationship with other men.

**[T-48-51] [R-52-55]**

Charity did not have sexual relations with anybody other than Cliff from the date of marriage October 1, 1993 to May 2009, one year after the separation. **[T-50] [R-54]**

Cliff testified that he did not know of any adverse affects on the children and that the children had not suffered in any way due to Charity's relationship with other men after the separation. **[T-162] [R-66]**

Cliff was very controlling during the marriage and if he got upset with Charity he would not talk to her for a week. **[T-60] [R-56]** As an example, Charity and the girls were at Chuckie Cheese with a church member and Charity was fifteen (15) minutes late returning home. Cliff got mad and didn't speak to Charity for a couple of days. **[T-60-61] [R-56-57]**

At the time of the separation when Charity took the two girls to live with Charity's mother, Cliff's main concern was about the continuation of his health insurance coverage and not custody of



the children. **[T-68] [R-58]**

Cliff's mother took care of the children when Charity was at work. **[T-77] [R-59]** The children were with Charity if she was not working. **[T-79] [R-60]**

Cliff's mother Cora Evelyn Jackson testified that Charity did a good job of parenting the girls. **[T-112] [R-61]** Cliff's mother further testified that Charity was a good mother when she was at home with the children. **[T-112-113] [R-61-62]**

Cliff's father E.C. Jackson testified that prior to the separation Charity was a good mother and a good wife. **[T-124] [R-63]**

Cliff testified that Charity was a good mother prior to the separation. **[T-140] [R-64]**

Cliff and Charity had a conflict over the date and place of tonsillectomy surgery for Anna Grace. Cliff threatened the doctor's staff that if the doctor did the surgery that Cliff would sue the doctor. **[T-157] [R-65]**

In reference to Charity's employment, Cliff admitted that Charity could make arrangements for the pickup and delivery of the girls at school if she was awarded custody. **[T-166] [R-67]**

Cliff made application in open Court that the Court could consider as an alternative awarding joint physical and joint legal custody of the girls to the parties. **[T-168] [R-68]**

Charity made application in open Court that the Court could

consider as an alternative an award of joint physical and joint legal custody of the girls to the parties. **[T-173] [R-69]**

### **SUMMARY OF THE ARGUMENT**

The standard of review of a domestic relations-child custody appeal is limited by the substantial evidence/manifest error rule. The findings of the Chancellor should not be disturbed unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Further, the Appellant Court views the facts in a light most favorable to the appellee and will take appellee's testimony and evidence at its best.

The Chancellor was not manifestly wrong; his opinion was not clearly erroneous; the Chancellor did not abuse his discretion; and the Chancellor did not apply an erroneous legal standard. To the contrary, the Chancellor's Albright analysis and opinion were supported by substantial evidence, particularly when viewed in a light most favorable to appellee.

For the reasons stated in appellee's argument, appellant's issue on appeal is without merit. Therefore, the Chancellor's decision should be affirmed in its entirety.

## ARGUMENT

### **STANDARD OF REVIEW**

The standard of review for this Court on this domestic relations appeal is set forth as follows, to-wit:

The scope of review by this Court in domestic relations appeals is limited by the substantial evidence/manifest error rule. *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* (quoting *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990)). Additionally, this Court views the facts in a light most favorable to the appellee, Ms. Labella. See *Rawson v. Buta*, 609 So.2d 426, 429 (Miss.1992). This Court will take her testimony and evidence at its best. *Jones v. Jones*, 532 So.2d 574, 578 (Miss.1988).

Labella v. Labella, 722 So.2d 472, 474 (¶4) (Miss.1998)

As trier of fact, the chancellor "evaluate(s) the sufficiency of the proof based upon his assessment of the credibility of the witnesses and the weight he thinks properly ascribed to their testimony." *Rakestraw v. Rakestraw*, 717 So.2d 1284, 1287 (¶9) (Miss.Ct.App. 1998). Our scope of review is "limited." *Rakestraw*, 717 So.2d at 1287 (¶9). The Mississippi Supreme Court has reiterated that in reviewing a divorce decree: "we view the facts of [the] decree in a light most favorable to the appellee and may not disturb the chancellor's decision unless we find that decision to be manifestly wrong or unsupported by substantial evidence." *Boutwell v. Boutwell*, 829 So.2d 1216, 1220 (¶13) (Miss.2002).

M.W.F. v. D.D.F., 926 So.2d 923, 927 (¶13) (Miss.App. 2005)

The standard of review that must be adhered to by this Court is found in the case of *Wright v. Stanley*, 700 So.2d 274, 280 (Miss. 1997): "This Court does not reevaluate the evidence,

retest the credibility of witnesses, nor otherwise act as a second fact-finder. Unless the Chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard, we will affirm." Furthermore, this Court must not overturn the chancellor's decision if there be substantial evidence in the record to support his findings of fact. *Smith v. Jones*, 654 So.2d 480, 485 (Miss. 1995).

Daniel v. Daniel, 770 So.2d 562, 564 (¶5) (Miss.App. 2000)

In a child custody case, an appellate court "will not disturb a chancellor's judgment when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Nonetheless, "our limited scope of review directs that we will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interest of the child." *Copeland v. Copeland*, 904 So.2d 1066, 1074 (¶30) (Miss.2004) (citations omitted).

Woodham v. Woodham, 17 So.3d 153, 156 (¶6) (Miss.App. 2009)

"[The appellate court] will not disturb a chancellor's judgment when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Under this standard of review, our purpose is to determine whether the chancellor's ruling was support by credible evidence, not whether we agree with that ruling. (citations omitted)

Collins v. Collins, 20 So.3d 683, 689 (¶26) (Miss.App. 2008)

[Any] resolution of factual disputes is always a matter entrusted to the sound discretion of the chancellor." *Minter*, 29 So.3d at 850 (¶36) (citations omitted)

Wikel v. Miller, 2009-CA-00106-COA (¶12) (MSCA)

### **CHARITY'S RESPONSE TO CLIFF'S ARGUMENT**

On the day of trial, April 14, 2010, Cliff and Charity signed and filed a Joint Motion to Withdraw. Pursuant to said motion, the Chancellor entered its Order dated April 14, 2010, adjudicating withdrawn the answers, affirmative allegations, contest and denials filed by the parties and the fault grounds for divorce.

After entry of the aforesaid order, the parties filed their Consent Agreement pursuant to MCA § 93-5-2(3) thereby consenting to the granting of an irreconcilable difference divorce to the parties and submitting to the Court seven (7) issues on which they could not agree. During the trial, the parties agreed on issues 2-7 and their agreement was dictated into the record and approved by the Court.

The following issue one remained, the only issue to be adjudicated by the Court, to-wit:

1. All custody, visitation, medical insurance, educational expenses, federal and state tax dependency and support issues.

During the trial, Cliff and Charity made application to the Chancellor on the record for the Chancellor to consider as an alternative the award of joint physical and joint legal custody of the children to the parties.

The polestar consideration in all cases dealing with custody and visitation of children is the best interest and welfare of the child. Crider v. Crider, 904 So.2d 142, 144 (¶6) (Miss.2005); Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983).

MCA § 93-5-24(2) provides that joint custody may be awarded in irreconcilable difference divorces upon joint application by both parties. The Supreme Court in Crider found that when both parties in an irreconcilable difference divorce request the Court to make a custody determination then that request constitutes a joint application pursuant to MCA § 93-5-24(2).

In the case subjudice, the Chancellor exhibited extraordinary knowledge and application of the law when he requested and received from both parties on the record their application for the Court to consider as a custody determination alternative an award of joint physical and joint legal custody. Therefore, the Chancellor had the authority under Crider and MCA § 93-5-24(2) to award joint physical and joint legal custody of the two girls to the parties.

The Chancellor found by clear and convincing evidence that the polestar best interest of the two girls would be served by awarding to Charity and Cliff joint physical and joint legal custody of the children.

In making its custody determination the Chancellor made a detailed analysis of the eleven Albright factors.

The Albright factors provide no mathematical formula for deciding custody cases. Montgomery v. Montgomery, 20 So.3d 39, 42 (¶12) (Miss.App. 2009) "The Albright factors are a guide. They are not the equivalent of a mathematical formula." Lawrence v. Lawrence, 956 So.2d 251, 258 (¶23) (Miss.App. 2006). Although required to make a specific finding pertaining to each Albright

factor, it is not necessary for the Chancellor to state which party prevails or wins on each factor. Weeks v. Weeks, 989 So.2d 408, 411 (¶12) (Miss.App. 2008).

On August 4, 2008, the Court held a temporary hearing and awarded temporary physical custody of the children to Cliff. As specifically stated by the Chancellor, this temporary custody order was not res judicata.

At the time of the temporary hearing, (1) Charity was working the night shift, 7:00 P.M. to 7:00 A.M.; (2) Charity lived with her mother approximately forty-five minutes from the children's school. These were the two major factors the Chancellor considered in awarding temporary custody to Cliff.

Subsequent to the temporary hearing and prior to final trial, Charity purchased a new house five (5) minutes from the girl's school and changed her work hours to the day shift, i.e. 7:00 A.M. to 7:00 P.M.

The Chancellor's analysis and findings under each of the Albright factors are supported by substantial evidence. The Court's Albright findings are based on the proper legal standard and were not manifestly wrong, were not an abuse of the Chancellor's discretion and were not erroneous.

Charity addresses the Court's findings under each of the Albright factors as follows:

1. AGE, HEALTH AND SEX OF THE CHILDREN:

Cliff complains that the Chancellor erred by giving a



presumption of custody to Charity because of the sex of the two girls. The Chancellor stated pertaining to said factor as follows: "Because the children's sex is female, this sub-factor favors the plaintiff Charity Lynn Jackson." The sex of a child is a factor under Albright for the Chancellor to consider. The Chancellor did not apply a presumption of custody standard. Under Albright, the Chancellor was bound to consider each factor, including the child's sex, which he accurately applied. If the children had been age 14 and age 15 boys, then the factor probably would have favored their father. The Court correctly found that this factor favored the mother Charity.

2. CONTINUITY OF CARE PRIOR TO THE SEPARATION:

The Chancellor found that this factor slightly favored the father Cliff because the children spent more time with Cliff's family. Strong argument could be made based upon the evidence setforth in the statement of facts that the continuity of care favors Charity. However, Charity will not argue that the Chancellor's finding on said factor was error.

3. PARENTING SKILLS AND WILLINGNESS AND CAPACITY TO PROVIDE PRIMARY CHILD CARE:

Cliff complains that the Chancellor erred on this factor substantially because of Charity's affairs and the speculated time taken away from the children as a result of the affairs.

Charity did not have sex with anybody other than her husband from October 1, 1993 to May 2009. Charity's affairs began one year

after the separation. The children were not present with Charity when Charity engaged in sexual relations. The children were with Cliff when Charity engaged in sexual relations. The children were not exposed to and did not sustain any adverse affects because of her relationships.

Cliff admitted that he did not know of any adverse affects on the children and that the children had not suffered in any way due to Charity's relationships with other men after the separation.

Cliff's mother testified that Charity did a good job parenting the girls and that Charity was a good mother prior to separation.

Cliff's father testified that prior to the separation Charity was a good mother and a good wife.

Uncontradicted proof is that Charity did not take time away from the girls because of relationships.

This allegation that Charity's relationships interfered with her care and time with the girls is pure made up speculation.

The Chancellor's finding on said factor was correct and support by substantial evidence.

4. EMPLOYMENT OF THE PARENTS AND RESPONSIBILITIES OF EMPLOYMENT:

Cliff in his brief admitted that the Chancellor made no error in reference to this factor.

However, in that Charity works three days per week 7:00 A.M. to 7:00 P.M. one could argue that this factor favors Charity in that her work schedule allows her to be with the children for four

(4) full days each week.

Charity does not make that argument. The Court's finding on this factor was based on substantial evidence.

5. PHYSICAL AND MENTAL HEALTH AND AGE OF THE PARTIES:

Charity has hypothyroidism and Charity takes medication to control this condition. It is uncontradicted that Charity's thyroid condition does not cause Charity any impairment and does not affect her ability to function and to care for her two daughters.

Charity took anti-depressant medication for two years prior to the separation. After the separation when Charity got away from Cliff, Charity quit taking the anti-depressant medication on advise of the same doctor who had originally prescribed the medication.

Again, Cliff speculates without any proof that Charity's health will affect her ability to care for the children.

Cliff was an extremely controlling and demanding person. Cliff demanded that his supper be on the table between 5:00-5:30 P.M. To accommodate Cliff's demand, Charity would cook Cliff's supper in the morning at approximately 4:30 A.M. while Cliff was sleeping and prior to Charity going to work.

As aforesaid, after Charity got away from Cliff she had no need for anti-depressant medication.

The Court's finding on this factor was support by substantial evidence.

6. EMOTIONAL TIES OF PARENT AND CHILDREN:

Cliff confesses that the Chancellor did not err in his finding on this issue that this factor favors neither party.

7. MORAL FITNESS OF THE PARENTS:

The proof did not show any adverse affect of Charity's relationships on the children. Charity began her relationships one year after the separation. The children were not present when Charity engaged in sexual relations. The children were in Cliff's temporary custody when she engaged in the sexual relations. Cliff testified that he knew of no adverse affects on the children or on Charity's parenting of the children due to her relationships. The children were not exposed to Charity's relationships. Cliff's mother and Cliff's father both testified that Charity was a good mother prior to the separation. Even Cliff testified that Charity was a good mother prior to the separation.

Marital fault should not be used as a sanction in custody awards. Albright at page 1005.

In Carr v. Carr 480 So.2d 1120 (Miss. 1985) the Mississippi Supreme Court stated the law pertaining to the affect adultery has on the issue of child custody as follows:

This court holds that the fact of adultery alone does not disqualify a parent from custodianship but that the polestar consideration in original custody determinations is the best interest and welfare of the minor child. Carr at page 1121

Applying these guidelines to the case sub judice, this Court notes that moral fitness of

a parent encompasses the charge of adultery. But moral fitness is but one factor to be considered, and it is a factor worthy of weight in determining the best interest of the child. Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, but on the other hand, may have no affect. The trial court should consider this factor along with all others for making original custody determinations. Carr at page 1123

And as stated in Albright, marital fault should not be used as a sanction in custody awards. Carr at page 1123

In Moak v. Moak 631 So.2d 196 (Miss. 1994) the mother of two children ages 13 and 11 admitted to a two year affair with a co-worker and admitted later that she became romantically involved with another co-worker. In affirming the chancellor's order granting custody to the mother, the Supreme Court held as follows:

Although he expressed reservations about awarding physical custody to Dixie, he attempted to focus on the best interest of the children rather than on marital fault. Moak at page 197

However, the evidence in the record shows that Dixie had been the primary caregiver, especially with regard to the children's homework and social and church activities. Moak at page 198

The chancellor found that it was best for the physical custody of the children to remain with Dixie, the person to whom the children had always looked for supervision, food, and clothing. Moak at page 198

In Brekeen v. Brekeen 880 So.2d 280 (Miss. 2004) the Mississippi Supreme Court reversed the chancellor's ruling granting custody of the minor child to the father. In Brekeen, the mother

had an extra marital affair, was terminated from her employment, and because of her relationship with a third party left the marital home and her husband and son for over a week without contacting the husband or the minor child. In reversing the chancellor's ruling, the Supreme Court cited the following law from the Carr decision, to-wit:

The fact of adultery alone does not disqualify a parent from custodianship but that the polestar consideration in original custody determinations is the best interest and welfare of the minor child. Brekeen at page 284 (¶6)

Moral fitness of a parent encompasses the charge of adultery. But moral fitness is but one factor to be considered, and it is a factor worthy of weight in determining the best interest of the child. Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, but on the other hand may have no affect. The trial court should consider this factor along with all others when making original custody determinations. Brekeen at page 284 (¶6)

In Hollon v. Hollon 784 So.2d 943 (Miss. 2001) the Mississippi Supreme Court reversed a chancellor's ruling granting custody of a minor son to the father. In Hollon it was alleged that the mother was having a homosexual affair with her girlfriend roommate while the child was in the mother's custody. In reversing the chancellor's custody award to the father, the Court concluded as follows:

Within his analysis of the Albright factors, the chancellor abused his discretion by placing too much weight upon the "moral

fitness" factor and ignoring the voluminous evidence presented under the remaining factors supporting Beth as the preferred custodial parent. Therefore, we reverse the decision of the Chancery Court of Jackson County and award Beth custody of Zack and remand the case for a determination of Tim's visitation rights and further proceedings not inconsistent with the dictates of this opinion. Hollon at page 952 (¶39)

The finding of the Chancellor that this factor favors neither party is supported by substantial proof.

8. HOME, SCHOOL AND COMMUNITY RECORD OF THE CHILDREN:

Cliff confesses that the Chancellor did not err in his findings that this factor is neutral.

9. PREFERENCE OF THE CHILDREN AT AN AGE SUFFICIENT TO EXPRESS A PREFERENCE BY LAW:

This factor is not applicable as neither of the children have attained the age of twelve (12) years and is neutral.

10. STABILITY OF HOME ENVIRONMENT AND EMPLOYMENT OF EACH PARENT:

The Court found that since the separation Charity has improved her home and work stability. Charity's work condition changed, as aforesaid, from working night shift (7:00 P.M. to 7:00 A.M.) to working day shift (7:00 A.M. to 7:00 P.M.). Charity has worked at the Oxford hospital for thirteen (13) years. Charity became a registered nurse prior to either of the children's birth. Charity is not subject to call in or on call situations at the hospital. Charity's nurse supervisor is of the opinion that Charity is dependable and stable and testified that her work evaluations are

excellent. Charity has not been subjected to any disciplinary action and she has good job security at the hospital.

Charity's home environment is good. Charity purchased a house after the separation which is five (5) minutes from the girl's school and twelve (12) minutes from Cliff's residence. Both girls have their own bedroom which the girls decorated.

The concerns which the Chancellor had at the temporary hearing about Charity's work hours and distance of her home from the girls school were eliminated by Charity's purchase of the new home and move to day shift.

The Court's finding that this factor is neutral is supported by substantial evidence.

11. OTHER FACTORS RELEVANT TO THE PARENT-CHILD RELATIONSHIP:

Cliff complains that the Chancellor did not discuss the religious training of the girls under this factor.

Charity was involved with the church and the children's church activities. Charity taught both girls Sunday school classes (ages 2-5). Charity taught the girls' Wednesday night church classes. Charity took the girls to church on Sunday morning, Sunday night and on Wednesday night. Charity helped in the church nursery.

Since the separation, Charity and the two girls have been attending Keownville Baptist Church in Union County. Charity and the girls attend church on the Sundays that she has the girls and she is not working. Charity also attends Wednesday night service. Charity's job as a registered nurse does not allow her to attend



church "practically every time the doors have been open". However, Charity has been fully engaged in the children's religious training and attendance and has continued to do so subsequent to the separation as much as she can considering she has to work on alternate Sundays and alternate Wednesdays to support the girls and herself.

Cliff contends that due to Charity having to work, the girls religious training is cut in half. This is simply not true. During Charity's two week custody period under the Chancellor's joint physical custody schedule, Charity will have to work one Sunday and one Wednesday, therefore the girls will miss church one Sunday and one Wednesday night per month if Charity does not make alternative arrangements for the girls church attendance. This is 1 out of 4 Sundays and 1 out of 4 Wednesdays or one-fourth (1/4) not one-half (1/2) of the religious training prior to the separation.

The Chancellor's ruling that this factor is neutral is support by substantial evidence.

The Chancellor did not find either party to be unfit to exercise custody of the two girls.

There is no proof of unfitness against Charity. In most custody cases there is substantial proof of alcohol abuse and/or drug abuse and/or abuse, neglect and abandonment of children and/or placing the children in harms way because of a parent's selfish or indifferent attitude toward the children. This type proof simply does not exist in this case.

The parties applied to the Court for the Court to consider as an alternative joint physical and joint legal custody of the two girls. MCA § 93-5-24 provides for and defines joint physical and joint legal custody. The Chancellor properly applied the law and facts and made the finding and adjudication based on substantial evidence that the best interest of the girls would be served by awarding to Charity and Cliff joint physical and joint legal custody of the girls.

Because of the absolute lack of proof of unfitness against Charity and the age of the two girls, among other things, Charity could have cross-appealed for sole custody. However, after considering the facts and circumstances and locations of the parties, schools, extended family and jobs, the inescapable conclusion was made by Charity that this case was the perfect set of facts and circumstances for an award of joint physical and joint legal custody. The Chancellor in his unemotional wisdom saw that the girls would be best served by having equal love, support, shelter and care from both parents and their extended families.

The Chancellor's award of joint physical and joint legal custody of the two girls was supported by substantial evidence and should be affirmed.

### CONCLUSION

The Chancellor's opinion was supported by substantial evidence, particularly when viewed in a light most favorable and at its best to appellee. The Chancellor did not abuse his discretion, was not manifestly wrong and did not apply an erroneous legal standard.

Therefore, it is respectfully submitted that this Court should grant to Charity the following relief:

1. Affirm in its entirety the decision and opinion entered by the lower Court;
2. Tax all cost of appeal to appellant; and
3. Award to Charity attorney fees.

This the 16<sup>th</sup> day of November, A.D., 2010.

Respectfully submitted:



LUTHER P. CRULL, JR.  
P.O. Box 2181  
Grenada, MS 38902-2181  
(662)227-0900  
(662)227-0902 (fax)  
MSB No. [REDACTED]


Attorney for Appellee

CERTIFICATE OF SERVICE

I, LUTHER P. CRULL, JR., attorney for the appellee herein, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF THE APPELLEE to the following persons:

1. Chancellor John A. Hatcher, Jr.  
P.O. Box 118  
Booneville, MS 38829
2. Joe M. Davis  
Attorney for Appellant  
Rutledge and Davis  
P.O. Drawer 29  
New Albany, MS 38652
3. Charity Lynn Jackson  
Appellee  
1120 Hwy 30 West  
New Albany, MS 38655

This the 16<sup>th</sup> day of November, A.D., 2010.

  
LUTHER P. CRULL, JR.