

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-00922

LORETTA NICHOLS

APPELLANT

V.

DANYEL N. NICHOLS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

HONORABLE WENDY E. MARTIN
1113 Jackson Avenue
P.O. Box 2266
Pascagoula, MS 39568
Tel: (228) 769-8882
Fax: (228) 769-8870

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-00922

LORETTA NICHOLS

APPELLANT

V.

DANYEL N. NICHOLS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies 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 disqualifications or recusal.

1. LORETTA NICHOLS, APPELLANT
2. TAMIKIA R. GOLIDAY, COUNSEL FOR LORETTA NICHOLS
3. DANYEL N. NICHOLS, APPELLEE
4. WENDY MARTIN, COUNSEL FOR DANYEL N. NICHOLS
5. WILLIAM E. TISDALE, PRIOR COUNSEL FOR LORETTA NICHOLS
6. RICHARD J. SMITH, PRIOR COUNSEL FOR DANYEL N. NICHOLS
7. PATTIE GOLDEN, *GUARDIAN AD LITEM*
8. HONORABLE CARTER BISE, CHANCERY COURT JUDGE



WENDY WALKER MARTIN
Counsel of Record for Danyel N. Nichols

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES.....	1
I. STATEMENT OF THE CASE.....	2
A. Nature of the Case, Course of Proceedings and Disposition in the Court below.....	2
B. Statement of the Facts.....	3
II. SUMMARY OF ARGUMENT.....	12
III. ARGUMENT.....	12
A. Standard of Review.....	12
B. The Trial Court Did Not Err when it Awarded Sole Legal and Physical Custody of the minor children to Danyel Nichols.....	13
CONCLUSION.....	31
CERTIFICATE OF SERVICE.....	32

TABLE OF AUTHORITIES

CASES	PAGES
<i>Albright v. Albright</i> , 437 So. 2d 1003 (Miss. 1983)	12
<i>Carrow v. Carrow</i> , 741 So. 2d 200 (Miss. 1999).....	12
<i>Lawrence v. Lawrence</i> , 956 so.2d 251.....	22, 25
<i>Norman v. Norman</i> , 962 So.2d 718 (Miss. Ct. App. 207).....	12
<i>Owens v. Owens</i> , 950 So.2d 202 (Miss. Ct. App. 2006).....	21
<i>Sootin v. Sootin</i> , 737 So.2d 1022 (Miss. Ct. App. 1998).....	21
<i>Sumrall v. Muguia</i> , 757 So.2d 279 (Miss. 2000).....	12
<i>Taylor v. Taylor</i> , 909 So.2d (Miss. Ct. App. 2005).....	12

STATUTES

Mississippi Code Annotated 93-5-24 (9).....	22, 25, 27, 28
---	----------------

SECONDARY SOURCES

Deborah Bell, <u>Bell on Mississippi Family Law</u> , Subsection 5.03, 1 st Edition	
--	--

STATEMENT OF THE ISSUES

THE TRIAL COURT PROPERLY AWARDED SOLE LEGAL AND PHYSICAL CUSTODY OF THE MINOR CHILDREN TO DANYEL NICHOLS.

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Loretta Nichols ("Loretta") and Danyel Nichols ("Danyel") were married on April 28, 1996, in Gulfport, Mississippi. (TT 4, 189) To this union, three (3) children were born, namely: Michael Nichols ("Michael"), born on July 29, 1996, Gabriel Nichols ("Gabriel"), born May 13, 2003, and Uriel Nichols ("Uriel"), born August 10, 2005. (TT 5, 189)

Loretta filed her Petition for Separate Maintenance on March 26, 2008. (CP 1-6) She was awarded temporary physical custody of the minor children on or about July 8, 2008. (CP 18-21) In September of 2008, allegations arose concerning physical abuse of the parties' oldest child, Michael, by Loretta and her sister Juanita. (TT 99-100; 103, 115-117, 129) The allegations continued and resulted in an investigation by the Department of Human Services and Loretta's arrest for Domestic Violence against Michael. (TT 99-105) The abuse allegations were substantiated by DHS and on October 30, 2008, the children were taken from Loretta and placed in an emergency shelter for two weeks. (TT 91, Ex. 17) Loretta was later found guilty of Domestic Violence in Gulfport Municipal Court against Michael. (TT 126)

Danyel filed a Petition for Emergency Custody and his Counter-Petition for Divorce on November 6, 2008, and was then granted temporary custody of Michael by the Harrison County Chancery Court on January 5, 2009. (CP 24-37; 54-55) On May 6, 2010, the Chancery Court of the First Judicial District of Harrison County, Mississippi entered a final judgement granting Loretta a divorce on the ground of adultery. (CP 77-78) Danyel was awarded sole physical and legal custody of the parties' three children. (CP 78-94) Loretta was ordered to pay child support and granted visitation with the children. (CP 94-95) Loretta now appeals the decision of the chancellor awarding Danyel custody of the minor children.

B. STATEMENT OF THE FACTS

Loretta and Danyel were married on April 28, 1996, in Gulfport, Mississippi. (TT 4, 189) To this union, three (3) sons were born, namely: Michael, born on July 29, 1996, Gabriel, born May 13, 2003, and Uriel, born August 10, 2005. (TT 5, 189)

Throughout their marriage, Loretta and Danyel lived in several residences, but for the majority of their marriage they lived with Danyel's parents. (TT 190) Shortly before Uriel was born, the parties moved from Danyel's parents' home and into their own apartment. (TT 190-191) In January of 2006, Loretta separated from Danyel for the final time, removed all of the parties' possessions from the apartment placing them into storage, took all

three children and moved in with her sister Juanita Anderson ("Juanita"). (TT 164, 191-199, 204-205) Juanita shared a four bedroom home with her mother, daughter, another sister, and occasionally other family members. (TT 166-170) Loretta shared a bedroom with the three boys. (TT 151)

Loretta filed a Petition for Separate Maintenance on March 26, 2008. (CP 1-6) By agreement of the parties, Loretta was awarded temporary physical custody of the minor children on or about July 8, 2008, with Danyel having visitation every other weekend, and every day from noon to 6:00 pm. (CP 18-20; TT 210) In September of 2008, allegations arose concerning physical abuse of the children by Loretta and other family members. (TT 90-126) The parties' oldest child, Michael, by Loretta and her sisters Juanita Anderson ("Juanita") and Janice Anderson ("Janice"). (TT 99-100; 103, 115-117, 129, 214-217)

During the separation, the parties agreed that Danyel would pick up the children after school and bring them to Loretta about 6:00 pm after she got off of work. (TT 89-90; 237) The children began to report to Danyel that Janice and Juanita were hitting them and Daniel saw Janice push and hit Michael. (RE TT 98; 215-17)

On or about September 10, 2008, after picking up the younger boys, Danyel went to pick up Michael at football practice as he always did. However, on this day, Loretta was there. (TT 103) Loretta decided that Michael was going to go home with her that day even though it was Danyel's visitation period and

started a scene in front of the school. (TT 96, 217) Danyel told Michael to get in the car with his mother to try to calm Loretta and to avoid embarrassing Michael in front of his football team. (TT 217) Loretta started grabbing and pulling Michael to her car. (TT 217-218) Danyel tried to calm the situation, but Loretta's behavior escalated and Danyel decided he would take Michael home. (TT 218)

When Danyel reached Loretta's home, the parties began to argue about the situation in front of the children while they were still in Danyel's truck. (TT 218) Michael was very upset, and asked his father if he would come get him tomorrow. (TT 218) Danyel replied he would try, but that he did not know if Loretta would allow him to do so, even though it would have been during his visitation period. (TT 218; CP 20)

Danyel then asked Michael to get the younger boys' bikes from the garage. (TT 99; 218-219) Loretta began fighting with Michael over the bikes "pushing him back in the house" and "struggling" and "wrestling" with him which resulted in Michael being pulled up stairs by Loretta. (TT 99-100; 218-219) Loretta "slung" Michael to the ground, and Michael fell down the stairs while she was dragging him up the stairs. (TT 219) Loretta then jumped on Michael's chest and started punching him which prompted Danyel to get out of his truck and go into the garage to help Michael. (TT 219; RE 5) Loretta pulled Michael into the house and locked the door before Danyel could reach them.

(99-100) Danyel could hear beating on the front door and Michael screaming. (TT 219-220; 99-100) Gabriel, who was about four years old, was watching this incident and crying. (TT 220) Danyel then watched Loretta shove Michael against the door, and told him to break the windows if he had to get out. (TT 219-220) Loretta threatened to call the police and report Danyel for breaking into the home, so Danyel went back to his truck and called the police. (TT 219) Michael had just turned twelve (12) years old.

The next morning, Loretta took Michael to Georgia and dropped him off, hiding him from Danyel. (TT 101-104) Danyel called to check on Michael at his school and informed he was not there. (TT 104) Danyel, in fear for his son's safety, went by Loretta and Juanita's home. Juanita lied to Danyel and told him that she did not know where Michael was. (TT 179-181; 222-223) Loretta hung up on Danyel when he attempted to call her, then refused to answer her phone. (TT 222-223) Out of desperation, Danyel called the police who initiated a welfare check on the child. (TT 104; 223) The police also reported the incident to the Department of Human Services. (TT 104-106; 223) Loretta was told to immediately bring Michael back home by her attorney and the Department of Human Services. (TT 103-104)

The following day, Patricia Spain, ("Ms. Spain") a social worker with the Department of Human Services, ("DHS") went to visit Michael at school. Michael told Ms. Spain that he "adamantly wants to live with his father" and

that his mother was abusing him. (RE 5; Ex. 17) He showed her a healed scrapping scar and other marks on his body. (Id.) That Friday, Michael rode the bus home from school to Danyel's home. (TT 224) Danyel took pictures of Michael's bruises. (TT 224) Michael had bruises on his legs, the back of his legs, the back of his neck, and a lump from where he landed on the steps. (TT 224)

On or about September 30, 2008, Loretta was again accused by Michael of abuse. (TT 224-225; RE 5; Ex. 17) Michael reported to DHS that Loretta hit him on his head with a high heeled shoe because he wanted to go live with his father, that she choked him with a belt, and banged his head against the wall. (RE 5) Loretta denied this allegation and the allegation that she drug Michael up the stairs to the DHS. (RE 5)

During the time that Loretta lived with Juanita, she allowed the boys to be kept alone in the home with her mother, who has serious mental problems, including what may be schizophrenia, and her niece, who is "very slow" (TT167-170). Her brother Carl Anderson ("Carl") also lived at the home on occasions. Carl is schizophrenic and has had violent episodes in front of the children at the home in which the police have had to respond. (TT167-168; 361) Loretta denied that her mother and Carl have had any mental problems to the Court, even though her sister, Juanita admitted these facts to the Court. (TT 88; 166-170; 316-363)

Michael reported to DHS worker, Tiffany Garmon, ("Ms. Garmon") that his mother "beat him," choked him with a belt, and banged his head against the wall in front of Loretta. (RE 5) Ms. Garmon was not allowed to speak with Michael alone. (Id.) He further stated that his mother hit him in the top of the head with a high heeled shoe and that his bruises were from when his mother pulled him up the stairs. (Id.) Loretta however, lied to the social worker about this incident, claiming that it never occurred. (Id.) Michael then told Ms. Garmon that his aunt, Juanita, locks him out of the house everyday and would not allow him into the home until his mother got home. (Id.) He further stated that his mother threw away his clothes and shoes because he told her he wanted to live with his father. (Id.)

On October 2, 2008, Ms. Garmon visited Gabriel at his school. (Id.) Gabriel informed Ms. Garmon that his aunt Juanita was mean to them, that she liked to "whoop on [them]" and that she locked Michael out of the home and would not let him inside until his mother got home. (Id.) Gabriel also stated that his mother put Michael in a "chock hold" and fought with their mother. (Id.)

On or about October 28, Loretta again was accused of abuse of Michael. On this occasion, Michael wanted to call his father, but Loretta grabbed the phone from him and begin hitting him with the phone. (RE 5) Juanita grabbed him and pinned him down with a pillow over his head, while Loretta continued

to hit Michael with an extension cord, and bit him on his back. (TT 223-226; RE 5; Ex. 17) Danyel could see the bite mark on Michael's back and bruises consistent with Michael's statement. (TT 223-226; RE 5) Danyel took Michael to the police department and Loretta was then charged with domestic violence. (TT 226) DHS was again contacted. (TT 226)

On or about October 29, 2008, Michael was again locked out of the house by Juanita. (TT 227) This incident occurred after a football game at 11:00 pm. (TT 227-228) They refused to let the child in, even though he was banging on the door. (RE 5) Michael called his father from a neighbors' home. Danyel left his home to pick the child up, but Danyel's mother had reached the child before he got there. (TT 227-228) Danyel's mother then called Loretta to inform her where Michael was. (TT 228)

The following morning, Loretta picked Michael up from school to take him to the doctor. (TT 229) She took the other two boys with her. (TT 229) When they reached the parking lot, Michael ran to the police department. (TT 229-230) Loretta did not know where Michael went, and called Danyel and accused him of kidnaping Michael. (TT 229) Shortly thereafter, a social worker called Danyel and informed him that she had Michael, and had picked him up from the police department. (TT 230) The children were then taken from Loretta and placed into the shelter. (TT 231; RE 5) The children remained in the shelter without a shelter hearing until November 14th, 2008. (RE 5; TT 233) On that

date, the Youth Court dismissed the petition over objection of counsel, and transferred jurisdiction to Chancery finding that the emergency had dissipated and that neither party shall apply corporal discipline to the children or allow others to do so. (RE 5; TT 233) Loretta had formerly been employed by the shelter and was currently working for the Harrison County Juvenile Detention Center. (TT 231) At the hearing, Loretta admitted to choking and biting Michael. (TT 232) She also admitted to using restraint methods on Michael that she learned while working at the Harrison County Adult Detention Center. (TT 92) The evidence of abuse was substantiated and the DHS report reflected that Loretta's attempts to restrain her son "were abusive and inappropriate." (RE 4,5) DHS recommended that the children be placed in the father's custody and the mother have supervised visitation. (RE 4-5) In addition they requested that Loretta enter into a service agreement, which would include parenting classes, anger management, and a healthy marriage class. (RE 4-5) However, the hearing was dismissed due to the fact that the judge didn't want Loretta to lose her ability to work as a social worker and because she agreed to let Michael live with his father. (TT 232) Loretta was enjoined from administering physical discipline to the children or allowing anyone else to administer corporal punishment. (RE 5; EX 17) She was further required to take a parenting class by the social worker, Ms. Spain. (TT 357)

On January 5, 2009, the Chancery Court granted Danyel primary physical

custody of Michael. (CP 54) The Court also ordered that neither party shall corporally punish any of the children, nor allow any other person to corporally punish the children. (CP 55) The Court also appointed Patti Golden, the Harrison County Public Guardian, as the Guardian ad Litem for the children. On March 19, 2009, Loretta was found guilty of domestic violence against Michael by the Gulfport Municipal Court and ordered to attend the domestic violence impact panel. She was also placed on twelve months probation. (TT 358 TT 126, 177, 182, 358)

Loretta did not attend the domestic violence classes, nor did she attend parenting classes. (TT 368-369) Loretta did not go to the classes because she did not believe that she needed parenting classes or the domestic violence classes. (TT 369) She further testified that she did not believe she needed anger management classes, but she completed the classes because someone told her at Gulfport City Court that she had to attend "something." (TT 368) Loretta continued to corporally punish the children and allowed other family members to corporally punish the children in spite of the Court Order enjoining her from doing so. (TT 159-161; 367; RE 4)

On April 15, 2010, the Guardian ad Litem ("GAL") rendered her report to the Court concerning the children. (RE 4) In her report, the GAL noted that Loretta denied that the DHS found any cause of abuse, but readily admitted that she and family members were regularly corporally punishing the children.

(RE 4) Further, the GAL stated that the younger children were “uncontrollable” while with their mother and that Gabriel reported that they were spanked by their mother, aunt, and their cousin often and very hard. The GAL found that Loretta has difficulty caring for herself and the three children, that she is not financially able to live independently, that she shares a bedroom with the three boys, has difficulty controlling the younger children, has resorted to corporal punishment in violation of the Court Order, has allowed her sister and niece to physically punish the children. (RE 4) The GAL recommended that Loretta take all of the classes recommended by DHS within sixty (60) days, and secure a suitable home for the children. (RE 4) Further, the GAL recommended that the children never be left in the care of Juanita or niece at any time and found that Loretta and her family have entered into a course conduct intended to punish Michael for his opinions and do not seem capable of handling an adolescent boy’s needs. (RE 4)

On May 6, 2010, the Chancery Court of the First Judicial District of Harrison County, Mississippi entered a final judgement granting Loretta a divorce on the ground of adultery. (CP 77-78) Danyel was awarded physical and legal custody of the parties’ three children. (CP 78-94) Loretta was ordered to pay child support and granted visitation with the children. (CP 94-95) At the conclusion of the trial in this matter, Michael was thirteen years old, Gabriel was six years old, and Uriel was four years old. (RE 3)

II. SUMMARY OF ARGUMENT

The trial court properly found that physical and legal custody of the minor children should be granted to Danyel Nichols.

III. ARGUMENT

A. STANDARD OF REVIEW

Appellate review of domestic-relation matters is limited. *Carrow v. Carrow*, 741 So.2d 200, 202 (Miss. 1999). This Court shall not reverse the judgment of a chancellor unless the chancellor abused his discretion, was manifestly in error, or applied an erroneous legal standard. *Id.* (citation omitted). This is especially true when dealing with areas of divorce, alimony, and child support. *Sumrall v. Munguia*, 757 So.2d 279, 282 (¶12) (Miss. 2000). This Court should not disturb a chancellor's decision regarding custody matters unless the chancellor has abused his discretion, was manifestly wrong, or applied an erroneous legal standard. *Taylor v. Taylor*, 909 So.2d 1280, 1281 (Miss. Ct. App. 2005). The chancellor's findings of fact will stand as long as they are supported by substantial evidence. *Id.*

In determining child custody, the polestar consideration is the best interest of the child, which is analyzed under the *Albright* factors. *Norman v. Norman*, 962 So.2d 718, 720 (Miss. Ct. App. 2007) (citing *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983)). Loretta challenges the chancellor's reasoning under several *Albright* factors, which are listed below.

1. *Parenting Skills:*

Although both parents testified that they each had the willingness and the capacity to provide primary childcare for the children, the Court found that based on the physical abuse perpetrated on Michael in front of the younger children Danyel clearly had the better parenting skills and weighed this factor heavily in favor of Danyel. (RE 3) Loretta argues that the Court erred by failing to consider the “physical care, emotional support and guidance” of the children. She further argues that because she took Michael to counseling on two occasions, attended two basketball games and sought medical treatment for Michael for his gynecomastia that she is the better parent. (TT 121; 237)

Loretta cites Deborah Bell, Mississippi Family Law, Subsection 5.03[4] (2005) as defining parenting skills as the ability to provide physical care, emotional support, discipline and guidance. Loretta completely ignores the “discipline” portion of of this definition and instead claims that this factor should not favor Danyel because the record is unsupported as to the physical abuse perpetrated on Michael. She fails to acknowledge that Danyel coached his son’s basketball teams, attended all of his football games and basketball games, and also took the children to church (TT 37-38;121; 237). Loretta was clearly ill prepared to attend to the children’s physical care, as shown by her inability to provide suitable living arrangements for the children (RE 4). She is certainly unable to provide emotional support, discipline or guidance to the children as

shown by her frequent fights with Michael, her repeated use of overly abusive corporal punishment of Michael in front of the other children, her failure to follow through with appropriate counseling for the children, and her blatant disregard of the recommendations of DHS, the GAL, and the Gulfport Municipal Court. (TT 37; 362-363;369 RE 4) The investigation by the DHS substantiated the abuse of Michael. (RE 5) Michael reported the abuse to his father, DHS, and the GAL. (RE 4, 5) Loretta was found guilty of domestic violence in Gulfport Municipal Court for biting and leaving other bruises on Michael. (TT 177-180) Loretta admitted she "tussled" and "wrestled" with Michael. (RE 5) The GAL also found that Loretta's treatment of Michael was not appropriate and was calculated to punish him for wanting to live with his father. (RE 4) Thus, the record is filled with more than enough evidence to support the chancellor's finding that this factor strongly favored Danyel.

2. *Willingness and Capacity to Provide Primary Care:*

The Court found that Loretta was offered help by social services, that she refused to attend parenting classes, anger management, or the domestic violence panel because she did not think she needed such classes. (RE 3) Her refusal to follow the suggestions of the Guardian ad Litem, DHS, and complete her Court Ordered Domestic Violence program showed the Court that she does not have the willingness nor capacity to provide the children with primary care. This factor also heavily favored Danyel. (RE 3) Loretta argues that because she

testified that she had completed anger management classes (although she failed to provide the Court with a certificate of completion), and testified that she would attend parenting classes, if ordered, the chancellor "misunderstood the evidence presented at trial. However, by her own testimony, she admits that she was Court ordered to attend a Domestic Victim Impact Panel, but instead attended some anger management classes, and did not attend any of the other classes recommended by DHS or the GAL because she did not think that she needed classes. (TT 358-359; 369) Clearly the Chancellor's finding was substantiated by the record, the GAL report, the DHS report, and testimony of Loretta herself.

3. *Employment of the Parent and Responsibilities of Employment*

The Court found that both parties are gainfully employed. Danyel works less than forty hours per week. He is off when the children arrive home for school and is available for the children every morning. (TT 200-203) He has worked at the Grand Casino for approximately fifteen years and is able to take off work as needed for the children. He is the parent who has always dealt with the children at school. (TT 237-239) He is able to attend the children's extracurricular activities and also coach their athletic teams. (Id.) He is available for the children each morning and each evening until the children go to sleep.

Loretta works a forty hour week, is not home for the children when they

arrive from school, nor is she always available to be there for the children during school hours. (TT 149-150; 200-203, 222-224) She is unable to participate in the children's extracurricular activities. She relies on Danyel or Juanita or her niece to provide after school care (TT 149-150; 200-203) The GAL has recommended that neither Juanita nor Loretta's niece should ever be left alone with the children due to their abuse of the children while in their care. (RE 4) Loretta has also left the children alone with her mother who has mental problems. (TT 169) Although Danyel relies on family members or his girlfriend (now wife) Rhonda Allen to help provide care for the children, there has been no testimony that his choice of alternate child care was detrimental to the children. In fact, the GAL reported that the children liked Rhonda and her children. (RE 4) Further, he has provided after school care for the children since the separation. (TT 88-91) This factor clearly favors Danyel and has more than been substantiated by the record.

4. Emotional Ties Between the Parent and Child

Both parties testified that they have strong emotional ties to the children. However, because of Loretta's abuse of the children, her failure to follow the Court Orders and suggestions of DHS and GAL by attending classes, and her failure to refrain from corporal punishment of the children and continued allowance of others to corporally punish the children, the Court found that this factor favors Danyel. (RE 3)

Loretta now argues that her disciplinary actions were not maliciously directed toward any of the children thus her emotional bond has not been substantially effected with the children. This assertion completely ignores the fact that Michael constantly runs away from Loretta, she has caused her children to be placed in the county shelter for weeks due to her abuse, that the children are left with Juanita who abuses all of the children with Loretta's permission, that Michael has been punched, hit, bitten, and choked by his mother in front of the other children, and the fact that Michael ran away from his mother to report her to authorities for her abuse. (TT 90-119; 220-226) Clearly, Michael's actions are a strong indicator that he does not have an emotional bond with his mother. Likewise, Loretta's actions toward Michael as found by the GAL to be punitive in nature evidence an erosion of the emotional bond between mother and child. (RE 4; TT 239) The Chancellor correctly found that this factor favored Danyel.

5. Home, School, and Community Record of the Children

Danyel lives in a four bedroom home with Michael and Rhonda's children. (RE 4) All the children attend school. (RE 4) Uriel attends the Head Start. Testimony has shown that the Michael was doing poorly in school but that his behavior and grades have improved since he went to live with his father. Loretta did not deny this fact at trial. She did not mention any problems with the children's grades to the GAL or the DHS. (RE 4, 5) If she wanted to admit the children's grades into evidence, she could have done so at trial.

Gabriel and Uriel were doing poorly in school and have been punished regularly for failing to follow instructions by their own admission to the GAL while in Loretta's care. (RE 4) They are paddled at school and both have been suspended from school for behavioral problems while in Loretta's care. (RE 4) The GAL reported to the Court that the children were almost uncontrollable in her office and did not respond to simple requests despite the fact that they were school age. (RE 4) The GAL also reported that Loretta had a difficult time controlling the children in a restricted environment. (RE 4) At trial, the GAL testified that there was "no doubt in [her] mind that [Loretta's] relationship with Michael is out of control and that she cannot control him and that he needed to live with his father." (TT 334) The GAL further testified that Michael, Loretta, and Danyel all told her about the incident in which Loretta fought with Michael over the bike. (TT 333-334) The GAL testified that she believed that Loretta might be "teachable" and needed to go to classes and learn the skills necessary to be a good parent. (TT 334) However, the GAL was "disturbed" by the fact that Loretta readily admitted that she and her family corporally punished the younger children in violation of the Court order. (TT 335) There was no evidence presented at trial that Danyel had ever abused the children, that he was forced to rely on corporal punishment to control them, that he yelled at the children, or that the children misbehaved with Danyel. (RE 4; TT 343) In fact, the children all reported to the DHS and GAL that their father had never spanked them. (Id.) The children all reported to DHS that their aunt Juanita abused

them and locked them out of the house until their mother got home. (RE 4, 5) Further, Gabriel admitted that Michael was often locked out of the house by his mother and aunt, and that they choked Michael. (Id)

Loretta lives in a four bedroom home with her sister, mother, niece, and occasionally other family members. (RE 4; TT 165-167) She shares a room with Gabriel and Uriel. (RE 4; TT 149-150) When Michael was living with her, he also slept in the same bedroom as his mother and brothers. (RE 4) Her sister Juanita testified that their mother has been diagnosed with mental problems such as schizophrenia and that her daughter has some sort of mental deficiency as well. (TT 166-170) However, Loretta leaves the children alone in the care of whatever family member is at the home. She also allows her mother and niece to corporally punish the children along with Juanita. (RE 4) Juanita testified that she and Loretta have other family members with mental problems and violence issues that have lived in the home with them at times and on one occasion, while their brother Carl was living with them, who also has schizophrenia and a history of violence towards others, attacked another family member and began throwing things all over the house. (TT 166-170) This incident was also in front of the children, and they had to hide in the house until the police arrived. (TT 166-170)

Although Loretta was granted the use and possession of the bedroom home in Gulfport home in 2008, she never moved in. (RE 4) She testified that she could not move in because Danyel had taken the washer and dryer, and also

the refrigerator. When asked by the GAL why she did not move into the home, she stated that the plumbing was messed up. When asked why she did not simply fix the plumbing, she stated that Danyel continued to have access to the home and that made her uncomfortable. (RE 4)

The children have been active in sports and Michael plays drums for his grandfather's church. (TT 318) Danyel has coached Michael's football teams, basketball, and baseball teams. (TT 237) Loretta attended only two of Michael's games. (TT 237) Clearly, the home, school and community record factor strongly favors Danyel. The Chancellor correctly found that the evidence produced at trial clearly weighed this factor in favor of Danyel.

6. The trial court did not err when it favored Danyel

Michael is thirteen years old. He is old enough to express which parent he chooses to live with. Michael has expressed his strong desire to reside with his father on numerous occasions and also to the GAL. (RE 4) His desire to live with his father was caused by the abuse inflicted upon him by his mother in front of the younger children. (RE 4) The GAL did not believe that he was lying about any of the incidences involving the abuse by his mother so that he could live with his father. (RE 4) Loretta shares a bedroom with all the children in her mother's home (RE 4; TT258-261) Her mother has mental problems. Her brother Carl occasionally lives with them. (TT 260) Carl has been diagnosed with schizophrenia. (TT 259) Carl has had violent episodes at the home in front of the children. (259-260) Loretta's niece also lives in the home. She has

developmental problems, but has been allowed to keep the children and corporally discipline the children.

The Court found that it was in the children's best interest that they remain together. (RE 5) Testimony has shown that the boys have a strong emotional bond to one another. (TT 240-243) There has been no testimony that Danyel is anything but an exceptional father. There have been no allegations of neglect or abuse by Danyel. The boys are well behaved when they are with their father. Danyel does not have to resort to any type of corporal punishment to control the children. (RE 5) Mississippi case law makes it clear that keeping siblings together is assumed to be in the best interest of a child "absent a showing that the circumstances in a particular case are to the contrary." *Owens v. Owens*, 950 So.2d 202, 207 (Miss. Ct. App. 2006). There has been no showing of unusual or compelling circumstances that would be contrary to this particular case. See *Sootin v. Sootin*, 737 So.2d 1022, 1027 (Miss. Ct. App. 1998). In fact, by all accounts, viewing the totality of the circumstances, Danyel is by far the better choice of parent for all three of the boys, even had Michael expressed an opinion to live with his mother, which of course, he did not.

Loretta argues that because the boys are different ages and have been split apart during the separation, she should at least be granted custody of the younger boys. However, these boys will also grow into older children, and it has been proven that Loretta does not have the skills to parent such children. (RE 4) Indeed, Loretta has not shown that there are any circumstances in this case

that are unusual and compelling that would contrary to the chancellor's finding that the boys should remain together.

C. THE TRIAL COURT CORRECTLY FOUND THAT LORETTA NICHOLS COULD NOT SUFFICIENTLY REBUT THE FAMILY VIOLENCE PRESUMPTION CREATED BY 93-5-24(9)

Mississippi Code Annotated Section 93-5-24(9)(a)(i) (Rev.2004) creates a rebuttable presumption that it is not in the best interest of a child to be placed in the custody of a parent with a history of perpetrating violence against a family member. Section 93-5-24(9)(a)(ii) states that this presumption may be rebutted by a preponderance of the evidence. More specifically, Mississippi Code Annotated Section 93-5-24(9) (Rev.2004) states in pertinent part:

(a)(i) In every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence. The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party. The court shall make written findings to document how and why the presumption was or was not triggered.

This presumption may only be rebutted by a preponderance of the evidence.

See also Lawrence v. Lawrence, 956 So.2d 251, 262-63 (Miss.Ct.App.2006).

On July 8, 2008, the Court granted temporary custody of the children to Loretta with visitation being awarded to Danyel every other weekend from Friday at 6:00 pm until Sunday at 6:00 pm, and every day noon until 6:00 pm.

(CP 18) Loretta testified that she began having difficulties with Michael, the oldest son some time after the parties separation in 2006. The arguments between Loretta and Michael eventually escalated into physical altercations in which Michael claimed he was choked with a belt, bitten, dragged up a staircase, hit with various objects, and placed in what Loretta described to the Court as a restraint hold taught to her during her employment with the Harrison County Juvenile Detention Center. (RE 4, 5; TT 363-365) Loretta demonstrated this "hold" to the Court placing her arms behind Michael's shoulders and pushing forward his head. This "hold" has been called a "Full Nelson" by wrestling fans. (TT 364)

As discussed above, Loretta testified that she merely attempted to restrain Michael from taking his brother's bike with him to his father's home. She described this restraint as the same type of "hold" that the Court referred to as a "Full Nelson" and admitted to dragging the child up a flight of stairs and then keeping him from his father during Danyel's visitation period by physically restraining him inside the home. (TT 363-365) After this incident, Loretta immediately drove Michael to her sister's home in Atlanta, Georgia and left him there, hiding him from Michael and causing the child to miss school (TT 221-223)

According to Loretta, she was contacted by Pat Spain shortly thereafter and told that she must immediately bring Michael back to Gulfport to be interviewed.

Loretta brought him back on or about September 12, 2008. (RE 5) The DHS investigative report confirmed that Michael had bruises and marks in various stages of healing. (RE 5)

Michael also told social workers that he was locked out of house by Loretta or Juanita on several occasions for punishment, punched often by his mother, hit with a high heel shoe on the top of his head, put in "strain holds," and that his Aunt Juanita Anderson was also abusive to him. (RE 5) Juanita admitted to the Guardian ad Litem that she locked Michael out of the house, but "only when he doesn't come in and its dark outside." (RE 4) Michael claimed that on one occasion, his aunt held him down placing a pillow over his face while his mother "whipped" him with an electrical court, hit him with a telephone, and bit him on his back for requesting to live with his father. (RE 5) The DHS Investigative report states that Gabriel also claimed that his mother placed Michael in "chock holes" and hits Michael with various objects. (RE 5) Gabriel also reported to DHS that his Aunt Juanita was mean to all of the children, that she "whoops" them all frequently, and locks Michael out of the home frequently until his mother returned to the home. (RE 5) Loretta admitted that after meeting with DHS, she was told that she should enroll in anger management classes, parenting classes, and a healthy marriage class. (RE 4) However, Loretta further testified that she did not feel like she would benefit from any of these classes so she did not enroll. (TT 368-369)

Shortly after Loretta met with the DHS, she again abused Michael. Loretta was later found guilty of Domestic Violence against Michael, fined, placed on twelve months probation, and ordered to attend the Domestic Violence Impact Panel. (TT 369-369) As discussed above, Loretta testified that she met with some unknown person from the city court, who allegedly told Loretta she did not have to follow the court order, but instead, could just take some anger management classes. (Id.) Loretta never provided the court with a certificate of completion of such classes, but now argues that Danyel should have produced proof that she did not attend.

The Court found that Michael had been a victim of a pattern of abuse by Loretta under the Mississippi Code Annotated 93-5-24(9) and that due to Loretta's numerous abusive acts, Loretta had a history of perpetrating family violence against Michael. (RE 3) This finding created a rebuttable presumption that Loretta was required to prove by a preponderance of the evidence that it was not in the children's best interest to be placed with Danyel. *See Lawrence v. Lawrence*, 956 So.2d 251, 262-63 (Miss.Ct.App.2006)

The Department of Human Services received at least three referrals concerning Loretta's treatment of Michael sometime in 2008, one of the referrals was from a non-family member. (RE 4, 5) On October 11, 2008, the allegations of abuse of Michael by Loretta were "SUBSTANTIATED/ EVIDENCED" by DHS. (RE 4, 5) On October 30, 2008, Michael jumped out of Loretta's vehicle and ran

to the police department to report that his mother was abused him again two days before. (Id.) The Department of Human Services took emergency custody of all three children that same day.

The children remained in the Harrison County Emergency Shelter without a shelter hearing until November 12, 2008. The DHS investigative report found that Loretta's "attempts to restrain her son were abusive and inappropriate." DHS recommended the children be placed in the father's custody and that Loretta have supervised visitation. DHS further recommended that Loretta complete parenting classes and anger management classes. The Youth Court found that removal of the children was in their best interest and that the circumstance were of such an emergency nature that no reasonable efforts had been made to maintain the children within their home, and that the effect of the continuation of the children's residence within their own home would be contrary to their welfare. (RE 5)

The Youth Court then reconvened the shelter hearing two days later, giving custody of the youngest two children back to Loretta, and custody of Michael to Danyel pending further proceedings through Chancery Court, finding that the emergency situation had occurred, but had "dissipated." The Youth Court remanded the cause back to Chancery Court and further enjoined the parents from administering physical discipline which left marks or bruises to the children or allowing others to likewise discipline the children. (RE 5)

On January 5, 2009, this Court granted temporary custody of Michael to Danyel, ordered that neither party corporally punish any of the children, nor allow any other person to corporally punish the children. The Court also ordered the DHS to immediately turn over the entire file regarding the children for inspection. (CP Patti Golden, the Harrison County Public Guardian, was subsequently appointed as the Guardian ad Litem for the minor children. The Guardian ad Litem ("GAL") also recommended that Loretta attend anger management classes and parenting classes.

Loretta admitted at trial that she continued to corporally punish the children in complete disregard for the previous Court Orders. She also testified that she did not attend the Domestic Violence Impact Panel because did not need the class, nor did she attend the classes recommended by the Guardian ad Litem or her social worker because she felt like she did not need the classes.

The Court therefore found that there has been a history and pattern of domestic violence against Michael by Loretta which triggers a rebuttable presumption that it is detrimental to the children and not in the best interest of any of the children to be placed in sole custody, joint legal custody or joint physical custody of Loretta. According to Mississippi Code Annotated Section 93-5-24(9)(a)(iii) (Rev.2004), the court must consider six enumerated factors when making the determination of whether the rebuttable presumption set forth in section 93-5-24(9)(a)(i) has been overcome. Section 93-5-24(9)(a) provides in

pertinent part:

In determining whether the presumption set forth in subsection (9) has been overcome, the court shall consider all of the following factors:

1. Whether the perpetrator of family violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child because of the other parent's absence, mental illness, substance abuse or such other circumstances which affect the best interest of the child or children;
2. Whether the perpetrator has successfully completed a batterer's treatment program;
3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate;
4. Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate;
5. If the perpetrator is on probation or parole, whether he or she is restrained by a protective order granted after a hearing, and whether he or she has complied with its terms and conditions; and
6. Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

The Court found that Loretta presented absolutely no credible evidence to rebut the presumption of § 93-5-24(9) of the Mississippi Code of 1972, as amended. Clearly Danyel is an active, present parent in the children's lives and there was no testimony that he suffers from mental illness, substance abuse or any other circumstances which would affect the best interest of the children. Indeed, all of the testimony presented in this matter concerning Danyel's parenting skills were favorable. (RE 3)

However, Loretta was Court ordered to attend the Domestic Violence Impact Program, and it was further suggested to her by DHS and the Guardian ad Litem that she should complete anger management and parenting classes. (RE 3) However, by her own admission, she did not even bother to enroll in the parenting classes, healthy marriage class, or the domestic violence classes because she didn't believe she needed any help that the classes could offer her. (RE 3) Loretta failed to provide proof that she had completed a batterer's treatment program, nor did she claim to have done so.

The Court found that there is no history of alcohol or drug abuse by either party and Loretta was no longer on her probation, but she clearly has not complied with the terms and conditions of the probation as set out in the Court abstract. (RE 3) Additionally, by her own admission, she has continued to corporally punish the children in complete defiance of the Court's order and remains "incredulous" that she is not allowed to corporally punish her children. (RE 4) Thus, the Court found that Loretta has not overcome the presumption that she should be denied custody of the children. She showed no remorse for her treatment of Michael and continued to deny that she needed help with her parenting skills.

Loretta now argues that because she attended some anger management classes and testified that if ordered she would attend other classes that she has rebutted the presumption. However, this assertion completely ignores the

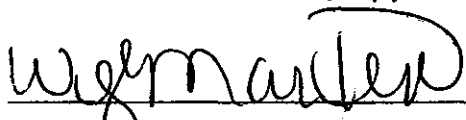
CONCLUSION

The Chancellor correctly weighed the *Albright* factors together with the presumption of 93-5-24(9) based on the evidence produced at trial and awarded Danyel sole legal and physical custody of the minor children. As such, this Court should affirm the Chancellor's decision and charge all costs of this appeal to the Appellant.

Respectfully submitted,

DANYEL NICHOLS, Appellee

By: _____


Hon. Wendy Martin, Attorney for Appellee

Hon. Wendy Martin

P.O. Box 2266

Pascagoula, MS 39568

Telephone: 228-769-8882

Fax: 228-769-8870

Miss. State Bar No. 

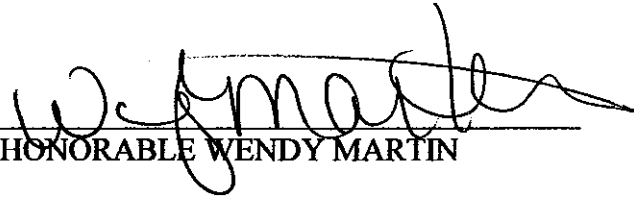
CERTIFICATE OF SERVICE

I, WENDY MARTIN, Attorney for the Appellee, DANYEL NICHOLS, certify that I
have this day mailed, postage prepaid, a true and correct copy of APPELLEE'S BRIEF to:

Honorable Tamekia R. Goliday
Post Office Box 13632
Jackson, MS 39236

Honorable Carter Bise
HARRISON COUNTY CHANCELLOR
Post Office Box 1542
Gulfport, MS 39502

This the 5th day of April, 2011.


HONORABLE WENDY MARTIN