

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 APPELLANT

ORAL ARGUMENT NOT REQUESTED

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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 Judges of this Court may evaluate possible disqualifications or recusal.

1. LORETTA NICHOLS, APPELLANT
2. TAMEKIA 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



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STATEMENT OF THE ISSUES

**WHETHER THE TRIAL COURT ERRED WHEN IT AWARDED 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, hereinafter "*Loretta*", and Danyel Nichols, hereinafter "Danyel", were married on April 28, 1996 in Gulfport, Mississippi. (TT, p. 4) Three children were born of the marriage – Michael Nichols, hereinafter "*Michael*", born July 29, 1996, Gabriel Nichols, hereinafter "*Gabriel*", born May 13, 2003, and Uriel Nichols, hereinafter "*Uriel*", born August 10, 2005. (TT, p. 5)

On March 26, 2008, Loretta filed a complaint for separate maintenance and temporary relief against Danyel, which was amended on November 21, 2008, to include a complaint for divorce. (CP, p. 1-6)(CP, p. 38-44) On or about July 8, 2008, a temporary order was entered which awarded physical custody of the children to Loretta. (CP, p. 18 - 21) Loretta and Danyel shared joint legal custody. (*Id.*)

On or about November 6, 2008, Danyel filed a motion for temporary relief in which he sought custody of the minor children. (CP, p. 33 - 36) A temporary order was entered on January 5, 2009, in which Danyel was awarded physical custody of Michael Nichols and Loretta maintained custody of Gabriel and Uriel. (CP, p. 54 - 55)

On May 6, 2010, the Chancery Court of the First Judicial District of Harrison County, Mississippi entered a final judgment granting Loretta Nichols and Danyel Nichols a divorce on the grounds of adultery. The chancellor granted primary custody of the parties' three children to Danyel. Loretta appeals the award of custody and argues that the chancellor

abused his discretion in his consideration and application of the Albright factors and the § 93-5-24(9) family violence presumption.

B. STATEMENT OF THE FACTS

Loretta Nichols and Danyel Nichols were married on April 28, 1996 in Gulfport, Mississippi. (TT, p. 4)(TT, p. 189) Three children were born of the marriage – Michael Nichols, born July 29, 1996, Gabriel Nichols, born May 13, 2003, and Uriel Nichols, born August 10, 2005. (TT, p. 5)(TT, p. 189)

During the course of the marriage, the parties separated and reconciled a number of times but on March 26, 2008, Loretta filed a complaint for separate maintenance and temporary relief against Danyel, which was amended on November 21, 2008, to include a complaint for divorce. (CP, p. 1-6)(CP, p. 38-44)

Without hesitation, Danyel describes Loretta as a “*good mother*” and “*wouldn’t take that from her.*” (TT, p. 200)(RE 5) However, shortly after filing her complaint for separate maintenance, Loretta began experiencing challenges with her oldest son, Michael, then 12 years old. (TT, p. 13-14) He became rebellious, disobedient, unruly and would often sneak out of the house. (TT, p. 13-14)(TT, p. 23 - 24)(TT, p. 67)(TT, p. 121)(TT, p. 158) Gabriel, when asked about his older brother’s behavior, indicated that “*Michael be mean to mom*” and he “*be acting bad*”. (RE 5)

Prior to the filing of the complaint for separate maintenance, both Danyel and Loretta disciplined the children by spanking them. (TT, p. 24 - 25)(TT, p. 209)(TT, p. 316) At the

time that the complaint for separate maintenance was filed, Michael was approximately 5 feet and 4 inches tall and weighed about 130 pounds. (RE 5) Danyel acknowledged the growing tension between Michael and Loretta and advised she needed to respond differently to Michael since he is *"already your size and he's just 12 years old."* (RE 5)

Loretta never believed Michael was a *"bad child"*, but acknowledged he was acting out because he felt caught in the middle of the divorce and *"is fearful of his father."* (TT, p. 98)(TT, p. 121) Michael felt *"pulled back and forth"* between his parents. (TT, p. 121) Danyel acknowledged that Michael was playing him against Loretta. (TT, p. 233)

On or about September 9, 2008, Loretta arrived at Michael's school to pick him up from football practice and found Danyel at the school. (TT, p. 217) Danyel confronted Loretta and began asking, *"why she was there."*(TT, p. 217) Danyel and Loretta engaged in a heated argument in front of Michael. (TT, p. 217)

Loretta instructed Michael to get into her vehicle but he decided in *"no way, shape or form in his head is he going with her."* (TT, p. 217) Michael came to Danyel's vehicle and Danyel told him, *"your momma told you to get in the truck, so get in the truck."* Michael began walking toward Loretta's vehicle when she grabbed him and instructed him to get into her vehicle. (TT, p. 217 - 218) As Loretta began fussing at Michael for his behavior, Danyel interrupted her and declared, *"No. That's all right. I'll bring him home."* (TT, p. 218) Michael immediately snatched away from Loretta and got in Danyel's vehicle. (TT, p. 218)

Danyel proceeded to drive Michael to Loretta's home. (TT, p. 218) Once they arrived at Loretta's home, Danyel admitted to Michael *"what went on at the school is not right. Even the way that I acted, it wasn't right."* (TT, p. 218) Danyel noted that Michael *"has an attitude with her where he feel like he can kind of respond, you know, like he had an attitude."* (TT, p. 218)

Michael got out of Danyel's vehicle and began walking toward Loretta, who was standing outside. (TT, p. 218) Danyel and Loretta began to argue again in the presence on Michael. (TT, p. 218) Michael got visibly upset and Danyel called him back to his vehicle. (TT, p. 218) Danyel told Michael *"I'll come get you tomorrow. I don't know what your mama's going to say about it, though, but I'm going to come get you,"* and instructed Michael to *"bring me Gabriel's bike out of the garage."* (TT, p. 218)

Danyel never spoke with Loretta about removing the bicycle from her home. (TT, p. 218)(TT, p. 99) Loretta told Michael to leave the bike and he pulled away from her. (TT, p. 219) Danyel yelled to Michael to *"run get in the truck"*. (TT, p. 99) Loretta grabbed Michael and instructed him to go into the house. (TT, p. 219)(TT, p. 99) Michael jerked away from her and they fell to the ground. (TT, p. 219)(TT, p. 99) Loretta grabbed the collar of Michael's shirt and attempted to force him into the house. (TT, p. 219) Danyel left his vehicle and began to walk toward Loretta and Michael when Loretta demanded he leave her home. (TT, p. 219) Loretta got Michael into the house and he began banging on the door and screaming for Danyel. (TT, p. 219 - 220)(TT, p. 99 - 100) Gabriel witnessed this heated

exchange and began crying. (TT, p. 220) Danyel instructed Michael to “*break the windows if you have to get out*” and left the premises. (TT, p. 221)(TT, p. 101) Both Loretta and Danyel called the local police to report the incident. (TT, p. 221).

The next day, Loretta took Michael to Georgia to stay with her sister, Janice Anderson because she “*was fed up, and I didn’t want my child within the midst of an adult situation which his father is telling him to act out. So I’m trying to keep him away and keep him clear of adult situations. That’s why I took Michael to Atlanta.*” (TT, p. 98)(TT, p. 101)(TT, p. 179) Once Danyel realized that Michael was not at school, he called the local police and informed them that Michael was abused by his mother and presently missing. (TT, p. 221-224) The police began an investigation and contacted DHS. (TT, p. 221- 224) Loretta advised the police that Michael was in Atlanta, Georgia with his aunt, Janice Anderson. (TT, p. 221- 224)

The local police contacted the authorities in Georgia and they proceeded to the home of Janice Anderson. (TT, p. 221- 224) The investigating officer interviewed Michael and determined that he exhibited no signs of abuse and appeared to be having good time with his extended family. (TT, p. 223)(TT, Exhibit 16)(TT, p. 61 - 65)(TT, p. 297)

DHS assigned Patricia Spann, hereinafter “*Spann*”, to investigate the allegations of abuse made by Danyel and instructed Loretta to bring Michael back home immediately. (RE 5) Loretta brought Michael back home and Spann interviewed him on or about September 11, 2008, regarding the alleged abuse. During the interview, Spann noted that Michael was

approximately 5 ft and 4 in tall and weighed about 130 pounds. (RE 5) Michael advised Spann that he wanted to live with his father. (RE 5) When asked to identify any scars he had from the incident, Michael pulled up his left pant leg and pointed to what appeared to be a scarring scar that occurred as Loretta was trying to get Michael into the house. (RE 5)

Spann continued her investigation and found no reason to immediately remove Michael from Loretta's custody. (RE 5) Recognizing that Michael was having difficulty dealing with the divorce, Loretta she sought counseling for him. (TT, p. 121) Michael continued to reside with Loretta until October 30, 2008, when he walked into a local police station and stated that he was physically abused by his mother, Loretta. (RE 5)(TT, p. 230)

Prior to going to the police station, Loretta checked Michael out of school so that she could take him to a doctor's appointment. (RE 5)(TT, p. 93) Upon arriving at the doctor's office, Michael asked his mother if he could walk to a nearby Wendy's Restaurant to get something to eat. (RE 5)(TT, p. 93) Rather than going to the Wendy's Restaurant, Michael went to the police department. (RE 5)(TT, p. 93) Just two days earlier, Danyel took Michael to the same police station and reported that his aunt, Juanita Anderson, held him down while his mother whipped him. (RE 5)(TT, p. 225-226)

Spann immediately removed the minor children from Loretta's home and began her investigation. (RE 5) Michael reported that his mother became angry with him after he refused to tell her what he had done with his father that evening and that she hit him with the telephone when he attempted to call his father. (RE 5) During the investigation, Loretta

admitted that she used restraint methods she learned working at the Harrison County Adult Detention Center to subdue Michael when he got unruly and aggressive toward her. (RE 5)(TT, p. 92) Spann, based on her investigation, concluded that “*while Michael Nichols’ acting out behaviors is unacceptable, Mrs. Nichols’ response and attempts to restrain her son were abusive and inappropriate.*” (RE 5)

A shelter hearing was conducted on November 14, 2008, and it was determined that “*the emergency situation has now dissipated*” and the children were released into the custody of Loretta. (RE 5) Out of concern for Michael, Loretta voluntarily allowed him to live with his father in hopes that his behavior problems would improve. (TT, p. 13 - 14) Danyel resides with his girlfriend, Rhonda Allen, and her three children. (TT, p. 6)(TT, p. 29)(TT, p. 280) There have been no further allegations of abuse involving the parties. (TT, p. 90)(TT, p. 359)

In addition to DHS removing the children from Loretta’s care, the Gulfport Police Department instituted domestic violence charges against her. (TT, p. 94) The domestic violence charge and youth court proceeding both involve the October 30, 2008, allegation of abuse made by Michael. (TT, p. 94) Despite being absolved by the Harrison County Youth Court of the abuse charges, Loretta pled guilty to the domestic violence charges pending before the Gulfport Municipal Court because “*they stated that I would have to go to jail, which I know all this wasn’t true. So I have to give my best interest because I do have other kids to take care of.*” (TT, p. 94 - 95)(TT, p. 126) She plead guilty “*in order to protect*

myself, and not go to jail for something I did not do.” (TT, p. 95) Loretta was assessed a fine, placed on probation for twelve months and required to complete the domestic violence panel. ” (TT, p. 94 - 95)(TT, p. 177-178)

After pleading guilty, Loretta was interviewed by a City of Gulfport employee who determined she needed to attend the anger management classes to satisfy the requirements of the domestic violence panel. (TT, p. 358) Subsequently, Loretta attended and completed the anger management classes as required by the City of Gulfport and paid her fine. (TT, p. 95)(TT, p. 154)(TT, p. 368)(TT, p. 154) At the time of the divorce trial, Loretta had satisfied the conditions of her sentence and was no longer on parole. (TT, p. 94 - 95)

Because there were allegations of abuse, the chancellor, before deciding the case, appointed Patti Golden, hereinafter “*Golden*”, as a *guardian ad litem* to assess the situation and make a recommendation as to who should have custody of the children. (TT, p. 332)(RE 4) After completing her investigation, Golden recommended that Michael remain in the custody of his father and that Gabriel and Uriel remain in the custody of Loretta. (RE 4)(TT, p. 332)

Golden acknowledged that Mississippi law does not favor separating siblings but felt comfortable with her recommendation because “*there is a significant age and emotional difference between these little boys and Michael. That the two younger boys obviously have bonded together. I would never want to separate the two younger boys*” (TT, p. 335) She further indicated that the two younger boys “*need some attention*” that she felt they would

not get if they were placed in the home with Danyel, his girlfriend and her three children. (TT, p. 335) Golden opined that “*the mother has the capabilities, maybe with all the rest of this out of there, to give them the attention they need.*” (TT, p. 335) She did not perceive Loretta as a threat to her children. (TT, p. 340)

II. SUMMARY OF ARGUMENT

The trial court, after considering the evidence and testimony presented at trial, misapplied the Albright factors when it awarded sole legal and physical custody of the minor children to Danyel Nichols. The award of custody is manifestly wrong, clearly erroneous and wholly unsupported by the record evidence. Therefore, this Honorable Court should reverse and remand the custody determination to the chancellor for further proceedings.

III. ARGUMENT

A. STANDARD OF REVIEW

On appeal, the findings of a chancellor generally will not be reversed unless “*he was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.*” Madison County v. Hopkins, 857 So.2d 43, 47 (Miss. 2003). Put another way, this Court ought and generally will affirm a trial court sitting without a jury on a question of fact *unless* based upon substantial evidence, the court was manifestly wrong. Jackson Public Sch. Dist. v. Smith, 875 So.2d 1100 (Miss. Ct. App. 2004); Havens v. Broocks, 728 So.2d 580 (Miss. 1998).

Recognizing and applying this standard of review, the Mississippi Court of Appeals in Lawrence v. Lawrence, 956 So.2d 251, 259 (Miss. Ct. App. 2006) noted that it has a

heighten duty to engage in a “*careful and detailed examination*” of the chancellor’s findings where the chancellor, due to the conflicting evidence presented at trial, has difficulty deciding a case. In Lawrence, the chancellor indicated “*the Biblical illustration of this dilemma is the story of Solomon,*” and characterized the case as a “*close call.*” Id. The Court of Appeals determined that since the chancellor acknowledged his difficulty in deciding the case, it had a heightened duty to engage in a “*careful and detailed examination*” of the chancellor’s findings. Id.

Like Lawrence, the chancellor in the case *sub judice*, experienced difficulty in deciding this matter as evidenced by the fact that he openly acknowledged he “*had a problem with the credibility of both Mr. Nichols and Ms. Nichols.*” (TT, p. 419) Therefore, consistent with Lawrence, this Honorable Court should engage in a careful and detailed examination of the chancellor’s findings to determine whether he was manifestly wrong, clearly erroneous or applied an erroneous legal standard when he awarded sole physical and legal custody of the minor children to Danyel Nichols.

B. THE CHANCELLOR ERRED IN HIS CONSIDERATION AND APPLICATION OF THE ALBRIGHT FACTORS.

Mississippi Code Annotated § 93-13-1 (Rev. 2004) provides that parents are “*the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education, and the care and management of their estates*” and that “*neither had any right paramount to the right of the other concerning custody.*” In child custody cases, the polestar consideration is the best interests of the child. Hollon v. Hollon,

784 So.2d 943, 946 (Miss. 2001). When determining child custody, the chancellor should consider and apply the factors set forth in Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983). These factors are as follows:

- (a) age, health and sex of the children;
- (b) determination of which parent had the continuity of care prior to the separation;
- (c) which parent has the best parenting skills;
- (d) which parent has the willingness and capacity to provide primary child care;
- (e) the employment and employment responsibilities of each parent;
- (f) physical health, mental health, and age of parents;
- (g) emotional ties of parent and children;
- (h) moral fitness of the parents;
- (i) the child's home, school and community record;
- (j) the child's preference at an age sufficient to express a preference by law;
- (k) stability of the home environment; and
- (l) any other factors relevant to the parent-child relationship.

The Albright factors are a guide, not "*the equivalent of a mathematical formula.*" Lee v. Lee, 798 So.2d 1284, 1288 (Miss. 2001). On review, this Court should review the evidence presented at trial pertaining to each factor to ensure the child custody decision is supported by substantial evidence. Hollon, 784 So.2d at 947.

1. *The trial court erred when it determined that the parenting skills factor favored Danyel Nichols.*

The parenting skills factor evaluates the parents' ability to provide physical care, emotional support, discipline and guidance. Deborah Bell, Mississippi Family Law, § 5.03[4] (2005). The parent who shows they are attentive to the child's personal hygiene, medical needs, and engages the child in appropriate social activities should be favored on the

parenting skills factor. Id. Exposing children to parental disputes may be considered bad parenting. Id.

The trial court determined the parenting skills factor favored Danyel Nichols “*based on the physical abuse perpetrated on Michael in front of the younger children.*” This conclusion is wholly unsupported by the record evidence. The record evidence indicates that Loretta Nichols is a loving mother who has consistently provided for the physical care, emotional support, discipline and guidance of her children. She is attentive to their personal hygiene, medical needs and engaged the children in appropriate social activities.

Specifically, the record evidence indicates that Danyel Nichols considered Loretta to be a “*good mother and a good person*”. (R.E., Youth Court File, p. 22) (T.T., p. 200). She sought counseling for Michael because he was having a difficult time dealing with his parent’s divorce and medical treatment for his gynecomastia. (TT, p. 16)(TT, p. 20)(TT, p. 121) Loretta took the children to church and attended their social activities. (TT, p. 37-38)(TT, p. 152)(TT, p. 237)(TT, p. 354-355) Patti Golden, *guardian ad litem*, observed the two younger children in the home with Loretta and noted them to be well-groomed, adequately nourished, and healthy. (TT, p. 339)

The trial court, when evaluating this factor, failed to consider the physical care, emotional support and guidance Loretta Nichols provided to her children but focused his evaluation on the alleged physical abuse perpetrated on Michael by Loretta Nichols in the presence of the other children. Gabriel Nichols, when asked about the altercations between

his mother and brother, exclaimed, without fear or hesitation, that “*Michael be mean to mom sometimes and she get her belt out and whoop him,*” which clearly indicates that the other children were not negatively effected by the altercations between Loretta and Michael. (R.E. 5, p. 21)

Furthermore, Danyel admitted to engaging in verbal altercations with Loretta in the presence of the children and has instructed Michael to “*break the windows*” to get away from his mother. (TT, p. 217, - 218). Considering the fact that Danyel admitted to engaging in parental disputes in the presence of the children and has instructed Michael to break windows to get away from his mother, it is clear that the chancellor erred when it determined that the parenting skills factor weighs in favor of Danyel.

The chancellor’s determination that this factor favored Danyel lacks sufficient evidentiary basis. At a minimum, this factor favored neither party. The record evidence reflects that Michael had a difficult time dealing with his parents’ divorce which *on occasion* led to heated exchanges between him and his mother. Despite the heated exchanges, Loretta Nichols displayed love and concern for Michael by seeking counseling for Michael and voluntarily allowing Michael to live with Danyel in hopes that his behavior problems would resolve. (RE 5, p. 4-5)

2. *The trial court erred when it determined that the willingness and capacity to provide care factor favored Danyel Nichols.*

The trial court determined the willingness and capacity to provide care factor favored Danyel Nichols because Loretta “*refused to attend parenting classes, anger management,*

or domestic violence panel.” The chancellor’s determination is clearly unsupported by the record evidence since both Loretta Nichols and Juanita Anderson testified that Loretta attended and completed anger management classes and Danyel produced no evidence to the contrary. (TT, p. 95)(TT, p. 154)(TT, p. 368) Furthermore, Loretta testified that she would take parenting classes if directed by the court. (TT, p. 358)

The trial court wrongfully assumed that Loretta failed to complete the domestic violence panel when, in actuality, she satisfied the requirements of the domestic violence panel. After pleading guilty to domestic violence, Loretta was interviewed by a City of Gulfport employee who determined she needed to attend the anger management classes to satisfy the requirements of the domestic violence panel. (TT, p. 358) Subsequently, Loretta attended and completed the anger management classes as required by the City of Gulfport. (TT, p. 95)(TT, p. 154)(TT, p. 368) The chancellor clearly misunderstood the evidence presented at trial regarding the completion of anger management classes.

There exists no contradictory evidence which indicates that Loretta failed to complete anger management classes and is vehemently opposed to attending parenting classes. As such, the chancellor erred when he determined this factor favored Danyel. Morris v. Landsdell’s Frame Co., 547 So.2d 782, 785 (Miss. 1989)(uncontradicted testimony must be given weight by the trier of fact and can not be arbitrarily and capriciously rejected). This factor, at a minimum, favored neither party which is further evidenced by the chancellor’s acknowledgment that “*both parents testified that they each had the willingness and the capacity to provide primary childcare for the children.*” (RE 3, p. 17)

3. *The trial court erred when it determined that the responsibilities of employment factor favored Danyel Nichols.*

The employment responsibilities factor generally focuses on the “*suitability of a parent’s job for providing childcare.*” Deborah Bell, Mississippi Family Law, § 5.03[4] (2005). The record evidence indicates that Loretta is employed as a social worker by the Harrison County Adult Detention Facility where she works Monday through Friday from 8 a.m. to 4:30 a.m. (TT, p. 17 - 18)(TT, p. 149) She is not required to work on weekends. (TT, p. 17 - 18)(TT, p. 150) Since separating from Danyel, Loretta was responsible for getting the children up and ready for school daily. (TT, p. 17 - 18)(TT, p. 149) The children get out of school at about 2:30 p.m. and arrive home about 2:45 p.m. Loretta’s sister and niece provide child care until Loretta returns home at approximately 5:00 p.m. (TT, p. 149 - 150) When Loretta gets home, she helps the children with their homework and gets them ready for bed. (TT, p. 151) The children go to bed between 8:30 p.m. to 9 p.m. (Id.)

On the other hand, Danyel is employed as a dealer at Grand Casino and his work schedule fluctuates. (TT, p. 18)(TT, p. 200-201). At the time of trial, Danyel worked swing swift at Grand Casino from 7:00 p.m. to 3:00 a.m. Based on his work schedule, Danyel would be unable to provide care to the children during the evening and put them to bed. In turn, he would have to rely on his *live-in* girlfriend, Rhonda Allen, or family members to provide care for the children during the evening and at night.

Comparing the work schedules of Loretta and Danyel, it is clear the chancellor erred in weighing this factor in favor of Danyel since he is unavailable to provide care for the

children in the evening and at night. In Wheat v. Koustovalas, 42 So.3d 606 (Miss. Ct. App. 2010), the Mississippi Court of Appeals determined that the responsibilities of employment factor favors neither parent where both parents work and require the assistance for family to provide child care. Like Wheat, both Loretta and Danyel work and require the assistance of family members to care for the children. Therefore, this factors favors neither party.

4. *The trial court erred when it determined that the emotional ties factor favored Danyel Nichols.*

In most cases, courts determine that children have “*close emotional ties to both parents*,” and this factor favors neither parent Deborah Bell, Mississippi Family Law, § 5.03[7]. In the case *sub judice*, the chancellor , in error, found that “*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 finds that this factor favors Danyel.*”

The rationale employed by the chancellor fails to address whether the children share a close emotional bond with their mother and assumes facts which are blatantly inconsistent with the record evidence. Specifically, the chancellor determined there existed no close bond between Loretta and her children because of her “*abuse of the children*”. There exists no record evidence that Loretta abused Gabriel and Nichols as supported by the conversation Gabriel had with DHS employee, Tiffany Garmon, in which he indicated “*he do not get whooping*” from his mother. This assertion is further supported by the fact that the Youth

Court of Harrison County, relying upon the investigation conducted by DHS, returned the minor children to Loretta . (RE 5) The court failed to uncover any evidence which would suggest that Loretta abused or was a threat to her children. (RE 5) Patti Golden, *guardian ad litem*, after completing her investigation also determined that Loretta is not a threat to her children. (TT, p. 340)

As discussed *supra*, Loretta completed the anger management classes and is willing to attend parenting classes. Therefore, it is clear that the trial court erred when it weighed this factor in favor of Danyel based on its assertion that Loretta failed to complete the anger management classes and is unwilling to attend parenting classes.

The trial court assumes since Loretta spans her children there can exist no close bond between them which is simply not true and contrary to established Mississippi law which holds,

A parent, being charged with the training and education of his child, has a right to adopt such disciplinary measures for the child as will enable him to discharge his parental duty. Accordingly, he has the right to correct the child by reasonable and timely punishment, including corporal punishment. A parent has a wide discretion in the performance of such functions. The control and proper discipline of a child by a parent may justify acts which would otherwise constitute assault and battery, but the right of parental discipline clearly has its limits. The rule recognized by the majority of the courts is that a parent may, *without criminal liability*, inflict such punishment as is reasonable under the facts and circumstances.

Natural Mother v. Hinds County Welfare Department, 579 So.2d 1269, 1270 - 1271 (Miss. 1991). The test of unreasonableness is met at the point “*where the parent ceases to act in good faith and with parental affection, and acts immoderately, cruelly or mercilessly, with*

a malicious desire to inflict pain rather than a genuine effort to correct the child by proper means.” Id. There is no record evidence that Loretta acted maliciously toward any of her children. As a dutiful parent, Loretta is concerned for the welfare of her children and, when appropriate, has used corporal punishment as a disciplinary measure.

The trial court, in error, believed that at the time of the alleged abuse by Loretta, Michael weighed “*only about 88 pounds.*” (RE 3) The record evidence indicates that Michael was approximately 5 ft and 4 in tall and weighed about 130 pounds at the time of the subject events. (RE 5) Furthermore, Danyel acknowledged that when the questionable events occurred Michael was “*already your [Loretta’s] size.*” (RE 5) Because of his size and unacceptable behavior, Loretta, on occasion, employed a restraint maneuver to keep Michael from hurting her or himself when he acted out. (TT, p. 98)

The use of the restraint maneuver has not substantially effected the close emotional bond the children share with Loretta which is evidenced by various signs of affection, including but not limited to hugging and kissing. (TT, p. 23)(TT, p. 154) The *guardian ad litem*, Patti C. Golden, when interviewing Michael, noted that he was “*reluctant to speak ill of Ms. Nichols*” and “*did not appear to be coaxed or to have animosity toward his mother.*” (RE 4) She further noted that the two younger boys “*love their mother. They love their household. They’re happy.*” (TT, p. 337)

While in DHS custody, Gabriel advised the social worker that “*he wanted to go with his mother,*” and Michael indicated he wanted to go with his father, which indicates that the

children have close relationships with both their parents. Therefore, this factor favors neither parent since both parents testified at trial that they have a close bond with the children and there exists no contradictory evidence.

5. *The trial court erred when it determined that the home, school and community factor strongly favored Danyel Nichols.*

The trial court found that the home, school and community factor strongly favored Danyel since Michael's grades and behavior improved after he moved in with his father. Danyel never corporally punished the children and Loretta lives with her mother who was diagnosed with schizophrenia. None of these assertions are supported by the record evidence.

The trial court determined that Michael's grades and behavior improved since moving in with his father despite the fact that none of Michael's school records were presented at trial and Michael admitted to the *guardian ad litem* that he was reprimanded several times at school for using profanity and fighting. (RE 4) As such, it is clear that the record evidence fails to substantiate the assertion that Michael's grades and behavior improved after he moved in with his father.

The record evidence is clear that Michael desperately wants to live with his father and would say whatever he felt necessary to ensure that he remains in the custody of his father. Therefore, the best evidence of Michael's alleged improvement was his school records. They are an objective finding regarding Michael's alleged progress but were never admitted into evidence at trial.

In error, the trial court asserts that Danyel never corporally punished the children when Danyel admitted he disciplined and spanked the children. (TT, p. 24 - 25)(TT, p. 209)(TT, p. 316) Therefore, the record evidence fails to support this assertion.

The trial court asserts that Juanita Anderson, Loretta's sister, testified at trial that Loretta lives with their mother who was diagnosed with schizophrenia. This assertion is simply not true. When asked whether her mother, Georgia Mae Anderson, was diagnosed with schizophrenia, Juanita Anderson testified that "*I don't know the diagnosis*" but "*she go to the mental health.*" (TT, p. 165)(TT, p. 169) Furthermore, Danyel, when asked whether Georgia Anderson is a threat to his children, testified that Georgia Anderson "*really not around*" and "*she don't even have that type of energy.*" (TT, p. 258) The record evidence clearly indicates that Georgia Anderson is not a threat to the minor children.

Since the chancellor determined that the home, school and community factor strongly favored Danyel Nichols by applying facts which are not supported by the record evidence, it is clear he abused his discretion when he weighed this factor in favor of Danyel. At the time of trial, all of the children attended school but none of their school records were admitted into evidence at trial. Therefore, this matter should be reversed and remanded back to the chancellor so that he can consider the school records of the children and properly weight this factor.

6. *The trial court erred when it favored Danyel Nichols because he did not resort to corporal punishment to control the children.*

The trial court found that it was in the children's best interest to live together with

their father since he “*does not have to resort to any type of corporal punishment to control the children.*” In error, the trial court asserts that Danyel never corporally punished the children when Danyel admitted he disciplined and spanked the children. (TT, p. 24 - 25)(TT, p. 316) The record evidence fails to support this assertion, which creates reversible error.

7. *The trial court erred when it determined that it was in the best interest of the children to remain together.*

The chancellor determined that it was “*in the children’s best interest that they remain together,*” since “*testimony has shown that the boys have a strong emotional bond to one another.*” (RE 3) After completing her investigation, Patti Golden, *guardian ad litem*, recommended that Michael remain in the custody of his father in accordance with his child preference election and that Gabriel and Uriel remain in the custody of Loretta. (RE 4)(TT, p. 332) The chancellor disregarded the recommendation made by Golden because he believed she “*did not address the separation of the siblings, nor the effect that this may have on them.*” (RE 3) This assertion is wholly unsupported by the record evidence since Golden acknowledged at trial that Mississippi law does not favor separating siblings but felt comfortable with her recommendation because “*there is a significant age and emotional difference between these little boys and Michael. That the two younger boys obviously have bonded together. I would never want to separate the two younger boys*” (TT, p. 335)

Golden further indicated that the two younger boys “*need some attention*” that she felt they would not get if they were placed in the home with Danyel, his girlfriend and her

three children. (TT, p. 335) Golden opined that “*the mother has the capabilities, maybe with all the rest of this out of there, to give them the attention they need.*” (TT, p. 335) She did not perceive Loretta as a threat to her children. (TT, p. 340) This testimony is further substantiated by the fact that Michael had lived continuously apart from his younger brothers for over a year prior to the trial and neither of the boys were substantially effected by the separation.

Mississippi courts are generally hesitant to separate siblings but there is “*no hard and fast rule that the best interest of the siblings will be served by keeping them together.*” Owens v. Owens, 950 So.2d 202, 206 (Miss. Ct. App. 2007). Siblings may be separated when other circumstances indicate that the division would be in the best interest of the children. Id.

In the case *sub judice*, there exists other circumstances which justify the division: Michael desires to live with his father, “*there is a significant age and emotional difference between these little boys and Michael,*” the younger boys need a level of attention and stability Danyel is unable to provide and the children have lived separately for an extended time with no problems. Therefore, it is clear that the trial court failed to consider the totality of the circumstances surrounding this case when he refused to separate the children, which is reversible error.

In sum, it is clear this Honorable Court should reverse and remand the custody determination to the chancellor since he repeatedly misapprehended the record evidence and clearly failed to properly weight the Albright factors.

C. THE TRIAL COURT ERRED IN REFUSING TO ACKNOWLEDGE THAT LORETTA NICHOLS SUFFICIENTLY REBUTTED THE § 93-5-24(9) FAMILY VIOLENCE PRESUMPTION.

Mississippi Code Annotated § 93-5-24(9) (Rev. 2003) created a rebuttable presumption in a custody case against a parent “*who has a history for perpetrating family violence.*” The presumption, when triggered, holds 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 presumption is triggered where the chancellor finds by a preponderance of the evidence that one incidence of family violence resulted in serious bodily injury or, in the alternative, there exists a pattern of family violence. This presumption may be overcome by demonstrating that the perpetrator has been rehabilitated. A chancellor should consider the following six factors in determining whether the presumption has been rebutted:

- (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 circumstance 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.

Miss. Code Ann. § 93-5-24(9) (Rev. 2003). In the case *sub judice*, the chancellor 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 the sole custody, joint legal custody or joint physical custody of Loretta.*” (RE 3, p. 13 - 14). The chancellor, in error, further held that Loretta presented “*absolutely no credible evidence to rebut the presumption.*” Specifically, the chancellor ruled, as follows:

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. 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. However, by her own admission, she did not even bother to enroll in the classes because she didn’t believe she needed any help that the classes could offer her.

The Court finds that there is no history of alcohol or drug abuse by either party and Loretta is no longer on her probation, but she clearly has not complied with the terms and conditions of the probation. Additionally, by her own admission, she has continued to corporally punish the children in complete defiance of the Court’s order. Thus, the Court finds that Loretta has not overcome the presumption that she should be denied custody of the children.

The chancellor abused his discretion when he determined that Loretta presented “*absolutely no credible evidence to rebut the presumption*” since the record evidence

indicates that both Loretta Nichols and Juanita Anderson testified that Loretta attended and completed anger management classes and Danyel produced no evidence to the contrary. (TT, p. 95)(TT, p. 154)(TT, p. 368) Furthermore, Loretta testified that she would take parenting classes if directed by the court. (TT, p. 358)

The trial court wrongfully assumed that Loretta failed to complete the domestic violence panel when, in actuality, she satisfied the requirements of the domestic violence panel. After pleading guilty to domestic violence, Loretta was interviewed by a City of Gulfport employee who determined she needed to attend the anger management classes to satisfy the requirements of the domestic violence panel. (TT, p. 358) Subsequently, Loretta attended and completed the anger management classes as required by the City of Gulfport. (TT, p. 95)(TT, p. 154)(TT, p. 368). She completed the treatment program prescribed by the City of Gulfport and was subsequently released from parole.

Furthermore, Loretta has not committed any further acts of domestic violence. (TT, p. 359) There exists no record evidence that Danyel is absent, suffers from mental illness or substance abuse. Also, there exists no evidence that Loretta suffers from and is in need of treatment for alcohol and substance abuse. Therefore, three of the six factors set out in § 93-5-24(9) are inapplicable to this case.

Loretta sufficiently rebutted the § 93-5-24(9) presumption by presenting credible evidence that she satisfied the remaining three factors by attending the anger management classes in satisfaction of the requirements of the domestic violence panel, displaying a

willingness to enroll in parenting classes and committing no other acts of domestic violence. The chancellor ignored the uncontradicted evidence presented by Loretta which effectively rebuts the family violence presumption, which constitutes reversible error. As such, this Honorable Court should reverse and remand the custody determination to the chancellor since he abused his discretion when he determined that Loretta failed to rebut the presumption.

CONCLUSION

The trial court, after considering the evidence and testimony presented at trial, abused its discretion by awarding sole legal and physical custody of the minor children to Danyel Nichols. It failed to properly weight the Albright factors. As such, its findings are manifestly wrong, clearly erroneous and are not supported by substantial evidence. Therefore, this Honorable Court should reverse and remand the custody determination to the chancellor for further proceedings.

SO BRIEFED, the 10th day of January, 2011.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, TAMEKIA R. GOLIDAY, attorney for appellant, LORETTA NICHOLS,
certify that I have this day mailed, *postage prepaid*, a true and correct copy of
APPELLANT'S BRIEF to:

Honorable Wendy Martin
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Honorable Carter Bise
HARRISON COUNTY CHANCELLOR
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THIS, the 10th day of January, 2011.



TAMEKIA R. GOLIDAY