CERTIFICATE OF INTERESTED PERSONS

BRIAN KEITH WEBB
Defendant-Appellant

v. NO. 2010-CA-01626

PATRICIA ALICE WEBB
Plaintiff-Appellee

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Honorable Talmadge Littlejohn, Chancellor
   First Judicial District, Monroe County

2. Jason Herring
   Henderson Jones
   Attorneys for the Defendant-Appellant

3. Luanne Thompson
   Attorney for the Plaintiff-Appellee

4. Stephen Bailey
   Attorney
   Guardian ad Litem

5. Brian Keith Webb, Appellant

6. Patricia Alice Webb, Appellee

Luanne Stark Thompson
P.O. Box 360
Amory, Mississippi 38821

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

SUMMARY OF THE ARGUMENT

Judge Littlejohn issued a bench ruling on May 20, 2010, during which he carefully analyzed the *Albright* factors and, upon conclusion, awarded custody of the minor child of the parties to Patricia. In the written Judgment, the Judge incorporated his oral bench opinion as well as the reports of the *Guardian ad Litem.*

Brian argues Judge Littlejohn erred in his application of facts to the *Albright* factors and, alternatively, that Judge Littlejohn erred when he did not award joint custody. Judge Littlejohn's analysis was thorough and, additionally, supported by the recommendation of the *Guardian ad Litem.*

ARGUMENT

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, OR APPLIED AN INCORRECT LEGAL STANDARD WHEN IT FAILED TO PROPERLY CONSIDER CERTAIN PERTINENT FACTORS PURSUANT TO ALBRIGHT

"A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Sanderson v. Sanderson,* 824 So.2d 623, 625-26 (Miss.2002). Furthermore, we "will affirm the [child-custody] decree if the record shows any ground upon which the decision may be justified. . . . We will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interest[] of the child." *Mosley v. Mosley,* 784 So.2d 901, 905-06 (Miss.2001) [citations omitted.]

In the case at bar, a *Guardian ad Litem*, the Honorable Stephen Bailey, was appointed during the trial when abusive conduct on the part of Brian was testified to by Patricia. Pursuant to Mississippi Code Annotated section 93-5-23 (Supp.2008), in child custody cases where allegations of abuse are at issue, a guardian ad litem shall be appointed. *See also Robison v. Lanford*, 841 So.2d

1119, 1126 (Miss.2003). Judge Littlejohn accepted and adopted the recommendation of the *Guardian ad Litem* who recommended that Patricia be awarded physical custody of the minor child.

The *Guardian ad Litem* issued a Final Report and Recommendation which was filed on April 12, 2010, R. p. 27, and a Supplemental Report which was filed on May 24, 2010, R. p. 33. Judge Littlejohn issued an oral bench opinion on May 20, 2010 during which he discussed at length the testimony of the trial and his thorough application of the facts to the *Albright* factors. In his written Judgment, R. p. 37, Judge Littlejohn incorporated the Final Report and Recommendation and the Supplemental Report of the *Guardian ad Litem* as well as the oral bench opinion into the judgment. Between both the fully investigated recommendation of the *Guardian ad Litem* and the thorough analysis conducted by Judge Littlejohn, the facts of the case were absolutely, completely, and fairly applied to the *Albright* factors[1] resulting in an award of custody to Patricia of the minor child.

1

The *Albright* factors, used to determine what is in the best interest of the child in regard to custody, are: (1) age, health, and sex of the child; (2) a determination of the parent who had the continuity of care prior to the separation; (3) which parent has the best parenting skills and which parent has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) the physical and mental health and age of the parents; (6) the emotional ties of parent and child; (7) the moral fitness of the parents; (8) the home, school, and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) the stability of home environment and employment of each parent; and (11) other factors relevant to the parent-child relationship. *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss.1983).

No error exists in the application of facts to factors.

A. Moral Fitness Factor

Judge Littlejohn thoroughly reviewed the moral fitness factor during the delivery of his oral opinion when he found the moral fitness factor to be in Patricia's favor. He specifically mentioned the illegal use of methamphetamine by Brian Webb. Additionally, Judge Littlejohn mentioned that Brian Webb testified he does not smoke, drink alcohol, or use drugs even though Patricia testified that Brian drinks Jim Beam, Jack Daniels, and that she has seen him use drugs. Obviously, the Judge did not find Brian's testimony credible.. It is for the Chancellor to determine the credibility and weight of evidence. *Chamblee v. Chamblee,* 637 So.2d 850, 860 (Miss.1994). At the end of his analysis of the moral fitness factor, the Judge referenced the findings and report of the *Guardian ad Litem*, filed April 12, 2010, wherein the *GAL* stated that Patricia attends and is active in church, that the child enjoys church activities with her mother, and that Brian no longer attends church. The *GAL* further stated:

> I believe that Patricia has overcome any past moral failings and now lives a Christian lifestyle. Given the mother's regular attendance at church and the fact that the father does not attend church regularly with Sarah, this factor favors Patricia.

R. p. 29.

B. Employment Responsibilities Factor
C. Physical and Mental Health of the Parents Factor

Due to both factors being significantly influenced by the poor health of Brian, undersigned combines the discussion on the factors for the sake of brevity.

Judge Littlejohn found the employment factor to favor Patricia due to the fact that Brian is disabled. Judge Littlejohn correctly found this factor favored Patricia due to the fact that she is employed.

Judge Littlejohn found the physical and mental health of parents factor to favor Patricia as well due to the health problems of Brian. Judge Littlejohn correctly found this factor to favor Patricia. Patricia is not disabled and has no significant health problems.

Brian has significant health problems contributing to his disability, not the least of which are major surgeries on his neck and back. Judge Littlejohn additionally discussed Patricia's claim that Brian is bipolar taken with the fact that Brian had taken lithium in the past. Brian's reliance on *Owens v. Owens*, 950 So.2d 202 (Miss.Ct.App. 2006) is misplaced. Analysis under *Albright* is a factually specific determination based upon the unique facts of each particular case. It cannot be said that in all cases the disabled parent should be favored under the employment responsibilities factor–the determination, instead, must be made based upon the unique individual facts brought to light in each case. The

Owens case is silent as to the nature and extent of disability of the father.

In the case at bar, Brian's disability is a concern due to the extent of his disability as determined by both Judge Littlejohn and the *Guardian ad Litem*. Indeed, when making his recommendation that Patricia be granted physical custody of the child, the *Guardian ad Litem* specifically mentions Brian's remaining poor health as part of the basis for his recommendation. R. p. 31.

Furthermore, it is uncontroverted that Brian's mother moved into Brian's home after the case commenced. As the *Guardian ad Litem* stated when he discussed the physical and mental health factor :

> Brian continues to suffer from health problems and remains disabled and unable to work outside of the home. Brian's history of serious health problems remains an area of concern in this matter. Brian's mother continues to reside with him and helps him with standard household chores. This factor continues to strongly favor Patricia.

R. p. 29. When the *Guardian ad Litem* found the employment stability factor favored Patricia, he did so by finding that Brian is unlikely to ever be able to return to work and by finding that Patricia has maintained gainful employment. R. p. 30.

As stated above, the Court is not to arbitrarily substitute its judgment for that of the chancellor who is in the best position to evaluate all of the factors. *Mosley v. Mosley,* 784 So.2d 905-06. Judge Littlejohn evaluated the facts and

the factors and determined that the employment responsibilities factor and the physical and mental health factor favor Patricia.

D. Parenting Skills of Parents Factor

In finding the parenting skills factor favored Patricia, Judge Littlejohn specifically addressed the fact that Brian withheld the child from Patricia on Mother's Day. While Brian may offer self-serving testimony to support his contention that he offered the child to her mother, it was the Chancellor's decision to chose whose testimony was the most credible. *Chamblee v. Chamblee,* 637 So.2d 850, 860.

In his oral ruling, Judge Littlejohn additionally mentioned the fact that Brian allowed a goat to enter the house to eat papers which the Judge found not to be proper. The Judge appeared to be mostly concerned with the displays of temper on the part of Brian and specifically referenced a hole in the wall. In doing so, the Judge stated that he did not believe Brian's testimony that he had caused the hole by falling into the wall. Instead, Judge Littlejohn stated that he had seen the photograph and it is was his belief that Brian knocked a hole in the wall.

On appeal, this Court cannot reweigh the evidence and must defer to the chancellor's findings of the facts, so long as they are supported by substantial evidence. *White v. White,* 26 So.3rd 342, 352 (Miss.2010). Judge Littlejohn

correctly found that the parenting skills factor favored Patricia.

E. Home, School, and Community Record of Child Factor

Judge Littlejohn found the home, school, and community record factor to be equal as to the parties. Brian complains that he should be favored with this factor due to the fact that he kept the marital home and due to his mother living with him. As discussed above, his mother lives with him because he is handicapped and requires her assistance.

Brian additionally points out the frequent moves by Patty; however, the *Guardian ad Litem* found that the moves by Patty were in an effort to find nicer homes for her family. R. p. 30. The issue of a change in schools from Hatley to Amory was additionally addressed by the *Guardian ad Litem* when he discussed a change of school with the child's teacher in Hatley who stated that the child has done extremely well in the Hatley school and that Amory is also a good school. It should be further noted that Patricia continued to maintain the child's active participation in church which Brian has not. R. p. 29.

A Chancellor's findings of facts are entitled to deference. *Rainey v. Rainey,* 205 So.2d 514, 515 (Miss.1967). The Judge did not err by finding this factor was equal to the parties.

F. Stability of the Home and the Employment of the Parents Factor

In finding the stability of home and employment of the parents factor equal to the parties, Judge Littlejohn raised his concern over the fact that Brian kept more than ten dogs at his house. The Court has held that "we may not substitute our judgment for the chancellor's[,] but must determine if the chancellor's ruling is supported by substantial evidence." *Norman v. Norman,* 962 So.2d 718, 721 (Miss.Ct.App.2007). There was no error in the Judge finding this factor was equal for both parties.

G. Other Relevant Factors

At the outset, it is noted that Brian states in his brief without any cite in the record that there is no close relationship between Sarah and her half-sister, Delaney. However, the *Guardian ad Litem* found quite differently. He stated in his Final Report and Recommendation:

> Sarah's half-brothers are no longer residing in her mother's home, because they have gone to reside with their father out-of-state. However, Sarah's half-sister continues to reside in the home with her mother. Sarah has indicated to me during all of my interviews with her how much she misses her brothers who now live out-of-state. Further, she has indicated to me that she often misses her sister very badly when she is with her father for a week at a time under the terms of the temporary order. If custody was granted to Brian, the potential separation of Sarah from her half-sister who continues to reside in her mother's home, would not be in Sarah's best interest. The separation of Sarah from her half-sister could be very traumatic to her given the fact that she has already been separated from her half-brothers who

have moved out-of-state.

R. p. 30-31. The finding of the *Guardian ad Litem* is contrary to the statement by Brian.

The Judge correctly found the separation of siblings to be very significant in this case as well he should have. In the case of *Sumrall v Sumrall,* 970 So.2d 254, 259 (Miss.Ct.App. 2007), the Court upheld the Chancellor's award of custody to the mother where the child had a half-brother in the home with the mother. The Court found that separation of the half-brothers would be harmful, difficult, and not in their best interest. *Id.*

Brian additionally makes an argument that Patricia was not focused on the relationship between Sarah and Delaney at trial, but, instead, focused on the relationship between Sarah and Trenton, Sarah's half-brother. Sadly enough, the reason the relationship between Sarah and Trenton was testified to at length in the trial was because Brian continually made issues during the trial about Trenton, beginning with Brian's Motion for Emergency Relief filed on January 28, 2009, with claims that Trenton played too rough with Sarah causing bruises. R. p. 21. Brian's continued proclamations of unfounded bruises on Sarah even resulted in a Supplemental Report of the *Guardian ad Litem* filed on May 24, 2010 in which the *Guardian ad Litem* found the allegations of abuse to be unsubstantiated and

made purely to gain an advantage in the proceeding. R. p. 33.

Finally, Brian urges this Court to view the relationship between grandmother and granddaughter in the same manner as half-siblings. To do so would create unnecessary litigation in future custody cases and cause an already difficult job for our Chancellors to become even more complicated with regard to the weighing of *Albright* factors. The grandmother in the case at bar (referred to as "dictorial" by Judge Littlejohn in his bench opinion) chose to live with her disabled son because he is handicapped and cannot perform standard household chores as found and previously discussed by the *Guardian ad Litem*. R. p. 29. While it is generous of her to help her son and certainly beneficial that she is present to assist her handicapped son when his daughter visits, this should not be determinative of whether the disabled son is awarded custody.

Judge Littlejohn chose to find under other relevant factors that the relationship between Sarah and her half-siblings was an important factor that favored Patricia. "Findings of fact made by a chancellor simply may not be set aside or disturbed on appeal unless manifestly wrong." *Spain v. Holland,* 483 So.2d 318, 320 (Miss.1986). There was no error in this finding.

II. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR OR ABUSED ITS DISCRETION BY NOT ALTERNATIVELY AWARDING JOINT PHYSICAL AND LEGAL CUSTODY OF SARAH WEBB TO BRIAN AND PATRICIA WEBB

For this Court to determine whether a Chancellor abused his discretion, the Court must evaluate whether evidentiary support exists for the chancellor's findings. *Robison v. Lanford,* 841 So.2d 1119, 1122 (Miss.2003). Further, " [s]o long as there is substantial evidence in the record that, if found credible by the chancellor, would provide support for the chancellor's decision, this Court may not intercede simply to substitute our collective opinion for that of the chancellor." *Bower v. Bower,* 758 So.2d 405, 412 (Miss.2000). Judge Littlejohn thoroughly analyzed this case and, in so doing, he did not find it was in the best interest of the minor child to award joint custody. The polestar consideration in child custody cases is the best interest and welfare of the child. *Albright v. Albright,* 437 So.2d 1005 (Miss.1983). The Judge found that it was in the best interest of the minor child to award custody to Patricia which does not arise to the level of committing clear error or abusing his discretion.

CONCLUSION

Judge Littlejohn correctly found through his analysis of the facts presented at trial and through the investigation of the *Guardian ad Litem* that the *Albright* factors favored Patricia and that she should be awarded custody. No error exists in his ruling.

CERTIFICATE OF SERVICE

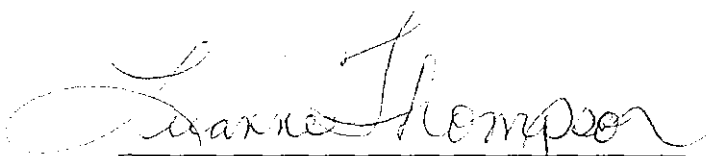
I, Luanne Stark Thompson, certify that today, August 8, 2011, a copy of the brief for the Appellee was served upon the following by U.S. Mail, postage prepaid:

Honorable Talmadge Littlejohn, Chancellor
First Judicial District of Mississippi
Post Office Box 869
New Albany, MS 38652-0869

Honorable Jason Herring
Post Office Box 842
Tupelo, MS 38802-0842

Honorable Henderson Jones
Law Office of Jason Herring
Post Office Box 842
Tupelo, MS 38802-0842

Honorable Stephen Bailey
Post Office Box 7326
Tupelo, MS 38802-7326



Luanne Stark Thompson
Post Office Box 360
Amory, Mississippi 38821