IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO: 2010-CA-01626

BRIAN KEITH WEBB **APPELLANT**

VS.

PATRICIA ALICE WEBB **APPELLEE**

APPEAL FROM THE CHANCERY COURT OF MONROE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

LAW OFFICE OF JASON D. HERRING, PA
Jason D. Herring, MSB#: [redacted]
Henderson M. Jones, MSB# [redacted]
Attorneys for Appellant Brian Webb
342 North Broadway Street
Post Office Box 842
Tupelo, MS 38802-0842
Telephone: (662) 842-1617
Facsimile: (662) 844-4999

CERTIFICATE OF INTERESTED PERSONS

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

1. Brian Webb, Appellant
2. Patricia Webb, Appellee
3. Jason D. Herring, Esq., Attorney for Appellant
4. Henderson M. Jones, Esq., Attorney for Appellant
5. Ms. Luanne Stark Thompson, Esq., Attorney for Appellee
6. Honorable Talmadge D. Littlejohn, Presiding Chancellor at Trial Court

Jason D. Herring
Attorney of Record for Brian Webb

LAW OFFICE OF JASON D. HERRING, PA
342 North Broadway Street
Post Office Box 842
Tupelo, Mississippi 38802-0842
Telephone: (662) 842-1617
Facsimile: (662) 844-4999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

STATEMENT REGARDING ORAL ARGUMENT

The appellant, Mr. Brian Webb, believes that oral argument would be beneficial to the Court in this case due to its complicated set of facts and the fact-intensive nature of the *Albright* analysis. Mr. Webb therefore requests that the Court grant the parties the opportunity to argue this case orally.

STATEMENT OF THE ISSUES

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. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE MORAL FITNESS OF THE PARENTS.

B. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE EMPLOYMENT RESPONSIBILITIES OF THE PARENTS.

C. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE PHYSICAL AND MENTAL HEALTH OF THE PARENTS.

D. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE PARENTING SKILLS OF THE PARENTS.

E. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE HOME, SCHOOL, AND COMMUNITY RECORD OF THE CHILD.

F. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE STABILITY OF THE HOME AND THE EMPLOYMENT OF THE PARENTS.

G. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE OTHER RELEVANT FACTORS.

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

STATEMENT OF THE CASE

Patricia Alice Webb filed a Complaint in this case on May 21, 2007, seeking a divorce from her husband, Brian Keith Webb, custody and support of their minor child, Sarah James Temple Webb, and other relief. R. 5-12[1]. On June 1, 2007, a Temporary Agreed Order was entered in which the parties agreed to joint custody of Sarah and an arrangement whereby the parties would have physical custody of Sarah on alternating weeks. R. 15-17. An Answer to the Complaint was filed by Brian on June 8, 2007, wherein Brian denied that it was in the best interests of Sarah for Patricia to be granted sole physical and legal custody be granted to Patricia. R. 18-23.

On February 8, 2008, Brian and Patricia agreed to a divorce on the ground of irreconcilable differences and agreed on all issues with the exception that the issue of custody and support of the minor child, Sarah Webb, was left for the court to decide. R. 33-34. On June 26, 2006, an order was filed appointing Stephen T. Bailey, Esq. as guardian ad litem for Sarah. R. 44. A Motion for Emergency Relief was filed on January 28, 2009, in which Brian claimed that he had noticed some bruising on Sarah and that he believed it was caused by Sarah's older half-brother that resided with Patricia. R. 45-48. Pursuant to that Motion, an Agreed Order of Emergency Relief was filed on February 19, 2009, in which the parties agreed that Patricia was required to supervise Sarah when she was in the presence of her older half-brother and that Patricia should prevent the children from "rough housing or having any inappropriate or potentially harmful physical contact." R. 49-50.

On April 12, 2010, the guardian ad litem, Mr. Stephen T. Bailey, Esq., filed his Final Report and Recommendation to the court, and he also filed a Supplemental Report on May 24, 2010. R. 53-58, 65-68. The court filed its Judgment on September 22, 2010, awarding sole

[1] The citation "R" shall refer to the pages of the Trial Court Record.

physical and legal custody of Sarah to her mother, Patricia. R. 69-73. A Notice of Appeal was properly and timely filed by Brian on October 4, 2010. R. 74-75.

STATEMENT OF FACTS

Brian Webb and Patricia Webb were married in Monroe County, Mississippi, on November 8, 2001, R. 7, and Patricia subsequently gave birth to their daughter, Sarah James Temple Webb on November 30, 2001. R. 8, T. 29.[2] [3] Sarah and Patricia lived in Brian's home along with Patricia's son, Trenton, and daughter, Delaney[4], from a previous marriage. T. 21, 84, 259, 302. Patricia also has an older son, Travis, who she allows to live with his father in California, T. 66, 82, 302, and she allowed Trenton to move to California to live with his father at some point during the course of litigation. T. 419. By Patricia's account, the marriage was somewhat tumultuous, as there was a great deal of arguing between her and Brian. T. 102. While the couple was married, several disputes arose between Brian and Patricia, and, as a result of those disputes, there were a number of occasions in which Patricia would leave the marital home, leaving Sarah solely in Brian's care for an extended period of time. T. 30, 229-35, 299-303. The couple finally separated on May 2, 2007, T. 29, 229-34, 299-303, and a Complaint for divorce was filed on May 21, 2007. R. 5-12. Soon thereafter, Brian's father passed away, and his mother, Jean Webb, moved into Brian's home. T. 106, 225, 311.

During the course of the marriage, Brian became disabled and was no longer able to conduct his business as a painting contractor. T. 308, 310. He was diagnosed with high blood pressure and high cholesterol, and he was forced to undergo a number of surgeries on his back, neck, and elbow. T. 308-09. Since that time, however, Brian's health has improved greatly. T. 138-43, 308. He lost a substantial amount of weight, and he currently has no health problems that would prevent him from being a father to Sarah. *Id.* He receives Social Security Disability

---

[2] The citation "T" shall refer to the pages of the Trial Court Transcript.
[3] It should be noted that pages 534-639 of the Trial Transcript are merely a reproduction of Patricia Webb's testimony in her case-in-chief that can be found on pages 17-122 of the Trial Transcript.
[4] At the time that the decision was issued by the trial court on May 20, 2010, the children's ages were as follows: Trenton, 16 years old; Delaney, 12 years old; Sarah, 8 years old.

benefits, but he is in the process of starting businesses that he can operate from home so that he can stop receiving disability payments. T. 308-11.

Patricia has been unable to maintain stable employment over the past several years. She had three separate terms of employment with United Furniture before being laid off. T. 18-19, 261. She also worked at the Grill at River Birch for a month before being laid off again, and she was working at Med Point in Amory, Mississippi, at some point during the course of trial. T. 78-79, 260-62, 464.

Brian continues to reside in the marital home, which is in the Hatley school district, whereas Patricia has resided in numerous places in the past ten years, including her current residence in the Amory school district. T. 262, 346, 428-30, 446. Brian has a great deal of extended family in the immediate area, but Patricia has no relatives living in the state of Mississippi. T. 194, 213, 225, 311, 444-45.

As discussed below, the trial court erred in its consideration of a number of the *Albright* factors in this case; therefore, the appellant, Brian, requests that this Court reverse the trial court's decision and grant him sole physical and legal custody, or, in the alternative, joint physical and legal custody of his daughter, Sarah.

STANDARD OF REVIEW

The scope of review of a Chancellor's custody determination is limited to whether the Chancellor abused his discretion, was manifestly wrong or applied an incorrect legal standard. *Ivy v. Ivy*, 863 So.2d 1010, 1012 (Miss. Ct. App. 2004). A Chancellor's findings of fact will not be disturbed where they are supported by substantial evidence. *Cooper v. Crabb*, 587 So.2d 236, 239 (Miss. 1991). The Mississippi Court of Appeals has held:

> The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.
>
> The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

Carter v. Carter, 735 So.2d 1109, 1114 (Miss. Ct. App. 1999). That is, the appellate court "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So.2d 405, 412 (Miss. 2000). Rather, the Court has stated "[i]f there is substantial evidence in the record to support the chancellor's findings of fact, no matter what contrary evidence there may also be, we will uphold the chancellor". *Bower*, 758 So.2d at 412.

In this case, the trial court abused its discretion, committed manifest error, or applied an improper legal standard in its application of a number of the *Albright* factors. Accordingly, the Court should reverse the trial court's decision and award sole physical and legal custody of Sarah Webb to her father, Mr. Brian Webb.

SUMMARY OF THE ARGUMENT

The trial court committed manifest error, abused its discretion, or applied an incorrect legal standard in its consideration of a number of the *Albright* factors in this case. In its consideration of the moral fitness of the parents, the trial court erred by applying too much weight to alleged drug use and past drinking alcohol and smoking cigarettes by Brian and applying too little weight to Patricia's admitted drug use and abortions. The trial court also erred in its consideration of the employment responsibilities of the parents by finding in favor of Patricia when Brian is disabled and capable of being a full-time parent to Sarah while also providing for her financially. The record reflects and the trial court concluded that the evidence was equal between the parties with respect to their physical and mental health; therefore, the trial court committed manifest error when it reached the illogical conclusion that the health factor was in favor of Patricia. The trial court committed manifest error or abused its discretion by concluding that the parenting skills factor was in favor of Patricia when the record shows that Brian has the superior parenting skills and that he has been Sarah's primary caretaker, while Patricia engaged in a number of behaviors that are not indicative of proper parenting skills.

In considering the home, school, and community record of Sarah, the trial court committed manifest error or abused its discretion by applying too little weight to the fact that Brian remains in the marital home and has family nearby and too little weight to the fact that a ruling in favor of Patricia would require Sarah to change schools. The trial court properly concluded that the stability of the home favored Brian when considering the stability of the home and employment responsibilities factor; however, it committed manifest error or abused its discretion when it concluded that this factor was equal because the employment responsibilities favored Patricia. Finally, the trial court committed manifest error, abused its discretion, or applied an incorrect legal standard by applying too little weight to the role that Sarah's

grandmother, Jean Webb, plays in her life and applying so much weight to the separation of Sarah from her half-sister that it became the determinative factor rather than Sarah's best interest. The aggregate effect of the trial court's improper considerations is that it returned a decision that was not in Sarah's best interest. The evidence clearly indicates that it is in Sarah's best interest that sole physical and legal custody be awarded to her father, Brian, and he requests that this Court reverse the decision of the trial court and award him sole physical and legal custody of his daughter, Sarah.

The trial court erred in light of the evidence presented at trial by not alternatively awarding joint physical and legal custody of Sarah to Brian and Patricia. The record indicates that Brian is a fit father and that proximity is not an issue as both parents reside in Monroe County, Mississippi. The parties have the ability to cooperate in Sarah's best interest; therefore, the trial court committed manifest error or abused its discretion by not alternatively awarding joint custody to Brian and Patricia. Brian requests that this Court reverse the trial court's decision and alternatively award joint physical and legal custody of Sarah to Brian and Patricia.

ARGUMENT

In a case of child custody, the "polestar consideration ... is the best interest and welfare of the child." *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). In determining what is in the best interest and welfare of the child, Mississippi courts are guided by the factors set out in *Albright*. These factors include: (1) age, health, and sex of the child; (2) which parent had continuity of care; (3) which parent has better parenting skills and the willingness and capacity to provide primary child care; (4) the employment responsibilities of the parents; (5) the physical and mental health and age of the parents; (6) the moral fitness of the parents; (7) the emotional ties of the parents and child; (8) the home, school, and community records of the child; (9) the preference of a child at the age sufficient to express a preference by law; (10) the stability of the home environment and employment of each parent; and (11) the other relevant factors in the parent-child relationship. *Albright*, 437 So. 2d at 1005. The appellant, Mr. Brian Webb, contends that the trial court improperly considered a number of these factors in awarding sole physical and legal custody to the appellee, Mrs. Patricia Webb, and he would set forth the following issues to the Court in support of his 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. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE MORAL FITNESS OF THE PARENTS.

The trial court committed manifest error or abused its discretion when it found this factor to be in favor of Patricia. In the court's analysis, it seemed to rely heavily on alleged smoking, alcohol consumption, and drug use by Brian, T. 522; however, Brian respectfully asserts that the court's ruling on this factor is improper, and the following reasoning will establish it as such.

Brian first argues that, contrary to any allegation by Patricia, he has never used any type of illegal drug. T. 305. He also argues that, although he used to drink and smoke, he has not done so in years, and he has never done so in the presence of Sarah. T. 328, 380, 383. If the Court wishes to consider this evidence, however, it should be noted that Patricia is no less culpable with respect to drinking and the illegal use of drugs. Patricia testified at trial that she drank in the past, and that she has also used crystal methamphetamine, possibly while she was pregnant with Sarah. T. 71-73, 77, 117. She testified that she attempted to smoke marijuana. T. 109-117. Further, Brian testified that Patricia had taken some of his prescription pain medication when they were married. T. 305. Brian certainly does not concede that he engaged in the types of behavior alleged by the appellee; however, if the Court wishes to consider these allegations, it should likewise consider the behavior of Patricia and determine her to be equally at fault, at a minimum, in this regard.

Brian would also contend that the court failed to properly consider and weigh Patricia's abortions. Patricia testified at trial that she had two abortions. T. 74. The trial court acknowledged this testimony, but it also reasoned, "[t]here was an explanation given as to that." T. 522-23. The appellant respectfully contends that the trial court erred in this reasoning, however, as the only explanation given by Patricia was that "[she] was 17," and that "[i]t was a case of rape." T. 117. The trial court may have deemed that such conduct was excusable under the circumstances of this singular abortion; however, there was no explanation given as to the circumstances of the other abortion. By seemingly failing to acknowledge the second abortion or at least require an explanation for the action that is morally reprehensible, the trial court failed to properly consider or weigh the evidence presented under this factor.

Brian would ask that the Court reverse the decision of the trial court and find this factor to be in his favor.

B. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE EMPLOYMENT RESPONSIBILITIES OF THE PARENTS.

In the application of this factor, there are two competing interests which one must logically address. The first is the amount of time that a parent is able to spend with the child. There are a number of Mississippi cases supporting the position that this factor should favor the parent whose work schedule allows him to spend more time with the child. *See Owens v. Owens*, 950 So. 2d 202, 210 (Miss. Ct. App. 2006) (favoring disabled father over employed mother); *Hammers v. Hammers*, 890 So. 2d 944, 952 (Miss. Ct. App. 2004) (favoring unemployed mother over self-employed father); *Ivy v. Ivy*, 863 So. 2d 1010, 1014 (Miss. Ct. App. 2004) (factor favored mother over father who worked long hours). The competing concern, however, is that the parent be financially capable of caring for the child. See *Mayfield v. Mayfield*, 956 So. 2d 337, 343-44 (Miss. Ct. App. 2007) (citing *J.P.M. v. T.D.M.*, 932 So. 2d 760, 775 (Miss. 2006) for the proposition that it is not error to favor a parent who has been steadily employed over one whose employment has been more sporadic). It is only natural for one to be concerned about these competing interests, and a court must balance them in order to determine what is in the best interest of the child.

The case that best addresses this issue and is most factually analogous to the current case is *Owens v. Owens*, 950 So. 2d 202, 210 (Miss. Ct. App. 2006). In *Owens*, the Court of Appeals reversed the trial court's ruling that the employment responsibilities factor favored an employed mother over an unemployed father, stating:

> This factor appears to be applied in two ways: either to prefer a parent who draws an income over one who does not, or, more often, to prefer a parent who works less or not at all and can therefore spend more time with his children. In the cases we have found where an unemployed parent was preferred, the reason cited is the time that the parent can spend with the child. In cases where an employed parent is found more suitable under this factor, the reasoning is that the unemployed parent has no source of income or appears to be unable to hold a steady job. Under either reasoning, this factor clearly favors James. He is disabled and does not work, and can therefore spend more time caring for Jordan. Although he is unemployed, he still draws an income from Social Security disability payments. Furthermore, James is not unemployed because he cannot hold a stable job, but because he is disabled and unable to work. Martha has presented no additional argument to explain why this factor should favor her rather than James. The chancellor erred in finding that this factor favors neither parent, as it clearly favors James.

Owens, 950 So. 2d at 210. In the present case, as in *Owens*, the trial court erred under either approach.

It was noted by the trial court in its ruling that Brian is disabled and that he draws Social Security disability payment as a source of income. T. 520. This naturally raises the issue of his physical ability to care for a child; however, that issue is more properly discussed under the mental and physical health factor, and it will be shown there that he is fully capable of caring for Sarah. Although his inability to work is certainly unfortunate to Brian, it allows him to spend a great deal of time with Sarah. He is able to be with her during the summers and when she gets home from school. T. 166-68, 214. He is able to take Sarah to her doctor appointments, and he cooks healthy meals for her. T. 143-45, 218, 243-45, 239-43, 248, 255-57, 333-34. Brian and Sarah are able to visit friends and family, and they go to places such as parks, museums and the mall during the summer or Sarah's other time off from school. T. 214, 334-37, 356-57. Brian has the ability to be a full-time parent, whereas Patricia does not.

The record reflects that Patricia, while fortunate to be able to work, does not have the ability to be a full-time parent like Brian. T. 464. She is not disabled, and she must work to maintain a living. T. 18-19, 78-79, 260-62, 464. Patricia also testified that she was enrolled in classes at Itawamba Community College, and that she planned to continue her educational endeavors. T. 19-20, 79. Brian contends that the court was in error when it failed to consider this fact in consideration of its ruling. T. 520-21. Although Brian acknowledges Patricia's testimony that she is enrolled part-time in online classes, it still does not necessarily follow that the requirements of her education would not prevent her from fully focusing on her duties as a parent. T. 19-20, 79. Brian concedes that educational pursuits are not employment *per se*; however, they are similar enough to the responsibilities of employment that they should be considered under this factor, and failure to do so under this factor or any other factor constituted manifest error by the trial court.

The trial court also erred under the financial capability approach. As previously noted, Brian draws disability benefits as a result of his inability to work. T. 520. He also has the assistance of his mother, Jean Webb, who works and earns a significant salary. T. 312. The record shows that he was also attempting to raise dogs and start an antique furniture business so that he could earn an income while remaining at home. T. 311, 341-42. In support of its ruling, the trial court stated, "[e]xcept for one year when [Patricia] was laid off, she's been a diligent mother as far as employment goes." T. 520. Brian argues that the court's conclusion is clearly contrary to the evidence presented at trial. The record indicates that Patricia's employment history since the birth of Sarah has been anything but stable. She worked for United Furniture on three separate occasions before being laid off. T 18-19, 261. She then worked for The Grill at River Birch for a month before being laid off again, and she was working at Med Point in Amory, Mississippi, at some point during the course of trial. T. 78-79, 260-62, 464. She testified

during her case-in-chief that she was living off of unemployment benefits, Pell grants, and student loans. T. 118-122. The court also failed to consider the fact that Jean Webb had paid all of the couple's bills during the marriage, and that Jean had given Patricia money and allowed her to use Jean's credit card after the separation. T. 106-07, 266-67, 276, 312.

The trial court erred in ruling that this factor was in favor of Patricia. The record clearly shows that, as a result of Brian's disability, he is capable of assuming the role of a full-time father and spend more time with Sarah while also being able to provide for her financially. The court failed to properly consider the great amount of time and attention that Patricia would be required to devote to her employment and her studies, and its reliance upon her "diligent" work history is clearly contrary to the evidence presented at trial. The court finally failed to properly consider Patricia's financial inability to care for Sarah. The trial court committed manifest error or abused its discretion in reaching its decision, and, due to the trial court's error, Brian requests that this Court reverse the ruling of the trial court and find this factor to be in his favor.

C. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE PHYSICAL AND MENTAL HEALTH OF THE PARENTS.

The trial court failed to properly consider the evidence presented at trial in ruling that the physical and mental health factor was in favor of Brian. As previously discussed, Brian is disabled and draws disability benefits; however, the inferential leap that his inability to work makes him unable to care for Sarah is without merit. The record reflects that Brian is capable of engaging Sarah in outdoor recreational activities. T. 214-15. Additionally, Brian's treating physician testified that his diabetes and blood pressure were under control, and that his blood pressure and sugar levels were within the normal range. T. 137-39. She also testified that she had seen Brian's health improve, and she credited a great deal of that to him losing seventy-one pounds. T. 138, 140. Her testimony further indicated that the back problems for which he had surgery had improved and that they, nor any other health condition, would prevent him from

caring for Sarah. T. 138, 140-41, 143. The record clearly indicates that Brian meets at least a minimum standard for the physical requirements of parenthood, and any conclusion to the contrary is clearly in error.

Brian also contends that the trial court reached an illogical conclusion when it ruled in favor of Patricia after finding the evidence to be even between the two parties. In the court's analysis of this factor it discusses the allegations of poor health by one party against the other, and it concludes, "[t]he net effect of it all balances out." T. 521. It then follows that conclusion by stating, "[f]actor number five is in favor of the mother." *Id.* In light of the presumption of parental equality pursuant to Miss. Code Ann. § 93-5-24(7) (2004)[5], it is clearly manifest error for one to reach a conclusion in favor of the mother when all the evidence "balances out", and therefore, this factor must be reversed.

D. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE PARENTING SKILLS OF THE PARENTS.

The trial court abused its discretion or committed clear error when it found that Patricia had the superior parenting skills. In reaching this conclusion, the trial court seemed to have some concern with respect to Brian's temper; however, there is a great deal of evidence on the record to support the fact that Brian does not have an anger problem that would prevent him from properly raising Sarah. Perhaps the most persuasive evidence is the testimony of Patricia. She testified on the record that Brian is a good father to Sarah, and that he would not harm Sarah. T. 30, 101. She also testified that Brian had only once used spanking as a means to discipline Sarah. T. 103. Brian's physician testified that she had never seen Brian angry and Jean Webb testified that she had never seen Brian be violent toward Patricia. T. 143, 267. The trial court also expressed its concern about Sarah being withheld from Patricia on Mother's Day, yet the record

[5] The text of Miss. Code Ann § 93-5-24(7) (2004) states, "There shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody."

reflects that Patricia was allowed to be with Sarah on Mother's Day, albeit at the insistence of Brian and Jean Webb. T. 32-33, 235-37, 303-04.

The trial court also appeared to be worried about Sarah's exposure to disputes between Patricia and Brian, but the evidence supports Brian in this regard as well. It was noted that at least on one occasion Patricia exposed Sarah to marital disputes in which she used vulgar language toward Brian. T. 229-34, 299-303. It was also Brian's uncontradicted testimony that Patricia struck him with her vehicle on one occasion and attempted to strike him on another occasion, one of which was when Sarah was present. T. 330-31. Such incidences clearly indicate that Patricia is unable to control her anger in the presence of Sarah.

Additionally, there is substantial evidence in the record to support the position that Patricia has engaged in certain behaviors that do not evidence proper parenting skills. One of these behaviors is her failure to address Sarah's hygiene issues. Patricia contends that she is attentive to these needs; however, she testified on the record that, even though Sarah has problems with body odor, she only bathed Sarah every other night. T. 462. At the time this testimony was given, Sarah was eight years old, and Patricia was even admonished by the Chancellor on the record for her failure to give Sarah daily baths. T. 465-66. Patricia has also agreed to allow two of her children to go and live with their father. T. 66, 82-83, 302, 419, 443-45. Similar facts to the case of *Fletcher v. Shaw*, 800 So. 2d 1212, 1216 (Miss. Ct. App. 2001), in which the Court upheld a custody modification in favor of a father when the mother allowed a child who was not at issue in the case to be cared for by someone else. Finally, Patricia has left the marital home on several occasions for an extended period of time, leaving Sarah solely in Brian's care. T. 88-91, 237-38, 272, 302-03. These behaviors are indicative of poor parenting skills on the part of Patricia, and the trial court was in error when it reached a conclusion to the contrary.

Brian finally argues that the record clearly indicates that he possesses parenting skills superior to those of Patricia. As previously noted, Patricia even admitted that Brian is a good father to Sarah. T. 101. Brian is very attentive to Sarah's hygienic needs, whereas Patricia is not. T. 331-33. He washes Sarah's hair, he used to help her clean herself after being potty trained, and he brushed her teeth before she was old enough to do so. T. 248-49. Kawanna Taylor, a Certified Family Nurse Practitioner, testified that Brian had been bringing Sarah to her clinic for medical treatment for a number of years and that he was a good father that was always attentive to Sarah's medical needs. T. 143-45, 147. Further, Sarah's bus driver, Ann Myatt, testified that Sarah is always neat, well dressed, and on time when she is staying with Brian. T. 168. Mrs. Myatt testified that Brian meets Sarah at the bus every day, and that Sarah is always happy to see her father. T. 166-67. According to her, Brian was always at home when Sarah got off the bus, but there were two occasions where Patricia was not home. T. 169-70. Brian cooks healthy meals for Sarah. T. 218, 243-45, 253-57, 333-34. He also engages her in social activities. T. 214, 334-37, 356-57. He reads Bible stories to her, and he allows her to read to him now that she is able to read. T. 198-99, 245-46. Brian taught Sarah to swim and ride a bicycle, and he also arranged all of her birthday parties. T. 248-49. Brian has been a loving and responsible father to Sarah in every way possible.

The trial court abused its discretion or committed clear error in concluding that this factor was in favor of Patricia. Brian does not have any anger issues that would prevent him from being a loving father to Sarah, and it was even conceded by Patricia that Brian would not harm Sarah and that he is a good father to her. Patricia exposed Sarah to marital disputes, and she engaged in behavior that is not indicative of a loving and responsible parent, while Brian has always been responsible and prompt in his attention to Sarah's needs. The record clearly indicates that Brian possesses superior parenting skills to those of Patricia, and the trial court committed manifest

error or abused its discretion in concluding that this factor was in favor of Patricia. Brian therefore requests that this Court reverse the ruling of the trial court and find this factor to be in his favor.

E. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE HOME, SCHOOL, AND COMMUNITY RECORD OF THE CHILD.

The trial court was clearly in error when it ruled that the home, school, and community record of Sarah Webb was even between the parties. Brian continues to live at the same residence where he has been residing since long before Sarah's birth, whereas Patricia has lived in at least five different places in the past ten years. T. 262, 428-30, 446. Brian has several members of his immediate family that live nearby, including his mother who lives with him, and Patricia has no relatives that live in the state of Mississippi. T. 194, 213, 225, 311, 444-45. Brian also assumes an active role in Sarah's social activities. T. 53-54, 337-38, 354-57. He has played an integral role in Sarah's education, as she has been shown to be an exceptional student. T. 259-60, 449-50. Patricia even admitted that her son, Trenton, went from a special education to the honor roll during the time that he lived in the house with Brian. T. 89. Finally, Patricia testified under oath that she had no intention of moving Sarah from the Hatley school district; however, she contradicted this statement by moving to a home in the Amory school district before the trial of this matter had even concluded. T. 54, 449-51.

Brian contends that the trial court failed to properly consider the evidence presented at trial when it found this factor to be even between the parents. The record clearly reflects that Brian plays an active role in Sarah's social activities and her education. He also continues to reside in the marital home, and he is the only parent with immediate family nearby. The trial court erred by not properly considering these facts, and it also erred by not properly weighing the fact that Sarah would be required to change schools, an event that can have a substantial impact

on the life of a young child. For these reasons, Brian requests that this Court reverse the trial court's decision and find this factor to be in his favor.

F. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE STABILITY OF THE HOME AND THE EMPLOYMENT OF THE PARENTS.

The trial court erred in ruling that the stability of the home and the employment of the parents was equal between the parties. In reaching a conclusion of equality on this factor, the trial court found in favor of Brian as to the stability of the home and Patricia as to the employment. T. 524-25. The trial court was correct in its conclusion that the stability favored Brian; however, as discussed above, the trial court erred in finding in favor of Patricia on the issue of employment.

The trial court properly concluded that the stability of the home favored Brian. This issue was thoroughly discussed in the previous section; therefore, Brian would not ask that the Court revisit that issue here. Also discussed above, however, were the employment responsibilities of the parents, and Brian demonstrated that the trial court erred in its consideration of that factor due to the fact that he is able to assume the role of a full-time parent while also being able to provide for Sarah financially. The trial court abused its discretion or committed manifest error under this factor as it did under the employment responsibilities factor, and, due to that error, Brian requests that this Court reverse the trial court's ruling and find this factor to be in his favor.

G. WHETHER THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE OTHER RELEVANT FACTORS.

The trial court erred in its consideration of the other relevant factors by applying too much weight to the separation of Sarah from her half-sister and applying too little weight to the separation from her grandmother, Jean Webb. Similar to the age and sex of the child, the separation of siblings is not a determinative factor in a case of child custody, rather it is one in "which the Chancellor may consider along with the best interests of the child." *Moorman v.*

Moorman, 28 So. 2d 670, 672 (Miss. Ct. App. 2009), *quoting C.A.M.F. v. J.B.M.*, 972 So. 2d 656, 661 (Miss. Ct. App. 2007). The Supreme Court of Mississippi has never adopted any *per se* rule to the effect that children should not be separated, *Sparkman v. Sparkman*, 441 So. 2d 1361, 1362 (Miss. 1983), but there is a presumption that is in the best interest of the child that she remain with her siblings. *Id.*; *See also Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. Ct. App. 1994). This presumption, however, may be rebutted upon a showing of special circumstances. *Owens v. Owens*, 950 So. 2d 202, 207 (Miss. Ct. App. 2006). "The placement of children with their siblings is not a concern that 'overrides' the best interest of the child," *Id.*, and the "polestar consideration" remains the "best interest of the child." *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).

The trial court improperly considered this factor by applying too much weight to the separation of Sarah from her half-sister, Delaney. As noted above there is a presumption in favor of siblings remaining together, and this presumption is based on the supposition that siblings develop a close bond while they are living together. Although Patricia would argue otherwise, there is not such a close bond between Sarah and Delaney so that separating them would be detrimental to Sarah. It should be noted that, even though there is a greater difference in age between Trenton and Sarah than there is between Delaney and Sarah, Patricia was more focused on Sarah's relationship with Trenton than with Delaney, T. 446; however, during the course of litigation, Trenton chose to leave Patricia and Sarah to go live with his father in California. T. 443-45. Since Trenton had the stronger bond with Sarah, yet chose to move to California, one can only logically infer that Delaney's bond with Sarah is something substantially less than that supposed by the Court in applying the presumption against the separation of siblings. It should also be noted that the record indicates that Sarah complained that Delaney only watched television and would not play with her. T. 263.

Brian would argue that special circumstances arise in this case in that Patricia has voluntarily allowed two of her children to remove themselves from her care so that they could live with their father in California. As discussed previously, Patricia's oldest son, Travis, already lived with his father in California, and her other son, Trenton, moved to California to live with his father during the course of trial. T. 66, 82, 443-45. It defies reason to believe that Patricia is very concerned about the alleged bond between her children when she so easily relented to Trenton moving away from his sisters.

The trial court also erred by applying too little weight to the role that Sarah's paternal grandmother, Jean Webb, plays in Sarah's life. In its opinion, the trial court addressed *Messer v. Messer*, 850 So. 2d 161, 167 (Miss. Ct. App. 2003), and *Neville v. Neville*, 734 So. 2d 352, 355 (Miss. Ct. App. 1999), for the principle that "the presence of extended family is a legitimate factor to support awarding custody to a parent;" however, those cases do not deal with involvement of a grandparent to the extent that has been shown in the case subjudice. Since the death of Jean's husband in July of 2007, Jean has resided in the home with Brian and Sarah. T. 225. During that time she has not only fulfilled the role of a grandmother, but she has also provided Sarah with motherly wisdom and care as well. Additionally, she continues to provide financial support to Sarah and Brian just as she did to the family when Brian and Patricia were residing together. T. 106-07, 266-67, 276, 312. By all accounts, Jean Webb has filled both the grandmotherly and motherly roles exceptionally well, and the trial court was in error when it failed to properly weigh this evidence.

Finally, Brian would argue that the separation of siblings should not be weighed so heavily that it becomes a determinative factor when he has proven that it is in Sarah's best interest that he be granted sole custody. It has already been proven that Brian is the more morally fit parent and that the employment responsibilities factor is in his favor. His physical and mental

health allow him to care for Sarah, and he has been shown to have the superior parenting skills. Finally, Brian provides Sarah with a more stable home environment that is more conducive to her educational pursuits and well-being. It has been proven that awarding sole custody to Brian is in Sarah's best interest, and allowing her best interest to be overridden merely because she would be separated from Delaney is error on the part of the trial court, for which its ruling should be reversed. Brian therefore requests that this Court reverse the decision of the trial court and find this factor to be in his favor.

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.

The trial court committed clear error or abused its discretion by not alternatively awarding joint physical and legal custody of Sarah to Brian and Patricia. In a case where the parties consent to an irreconcilable differences divorce but leave the determination of child custody to the court, it is error for the court to refuse to grant joint custody of the child to the parties when it has been shown that joint custody is in the best interest of the child. *See Crider v. Crider*, 904 So. 2d 142 (Miss. 2005). It has been shown that Brian is a fit parent. It has been shown that Brian plays an active role in Sarah's educational, social, and extracurricular activities. He has also been diligent in his attention to Sarah's hygienic and medical needs, and he provides a stable home for Sarah with a caring and nurturing environment. Additionally, it has been shown that both Brian and Patricia are residents of Monroe County, Mississippi, so their proximity is not an issue in an award of joint custody. The only issue that seems to be relevant in this case is the ability of the parties to cooperate.

In its opinion, the trial court seemed to rely on Brian's testimony that joint custody was no longer in Sarah's best interest in its denial of joint custody; however, this statement must be considered in light of the context in which it was given. T. 349, 499. It is true that Brian stated

that joint custody was not in Sarah's best interest; however, it was his understanding that he was attempting to seek full custody. It should be noted that Patricia testified that Brian was generally cooperative during the period that they shared joint custody of Sarah. T. 32. If an award of joint custody had been granted, Brian and Patricia would have been able to cooperate in the best interest of Sarah. Due to the fact that Brian is a fit parent, the parties live in close proximity to one another, and they would be able to cooperate in a joint custody agreement, the trial court was in error by not alternatively awarding joint custody to Brian and Patricia. Due to the trial court's error, Brian requests that this Court reverse the trial court's decision and alternatively award joint physical and legal custody of Sarah Webb to Brian and Patricia.

CONCLUSION

The trial court committed manifest error, abused its discretion, or applied an incorrect legal standard in its consideration of a number of the *Albright* factors in this case. It has been shown that it is in Sarah Webb's best interest that sole physical and legal custody be granted to her father, Brian Webb; however, the trial court, as a result of its erroneous application of several *Albright* factors, returned a decision that was contrary to Sarah's best interest. The trial court also erred by not alternatively awarding joint physical and legal custody of Sarah to Brian and Patricia. Brian respectfully requests that this Court find that the trial court's decision was the result of an erroneous application of the *Albright* factors and that the decision was not in the best interest of Sarah Webb. Therefore, Brian requests that the trial court's decision be reversed and that he be granted sole physical and legal custody, or in the alternative joint physical and legal custody, of his daughter, Sarah Webb.

CERTIFICATE OF SERVICE

This is to certify that I, Jason D. Herring, Attorney for Appellee, have this day served a true and correct copy of the above and foregoing Appellant's Brief, by placing a copy of same in United States Mail, postage prepaid, to the following persons:

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

Mr. Stephen T. Bailey, Esq.
Evans & Bailey, PLLC
Post Office Box 7326
Tupelo, MS 38802-7326

Honorable Talmadge Littlejohn, Chancellor
P.O. Box 869
New Albany, MS 38652

This the 6th day of May, 2011.

JASON D. HERRING