

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

GEORGE CURTIS BLAKELY, JR.

APPELLANT

VS.

NO. 2010-CA-01948

TEENA LYNETTE WILLIAMS BLAKELY

APPELLEE

BRIEF OF GEORGE CURTIS BLAKELY, JR.

**ON APPEAL FROM THE CHANCERY COURT
OF GRENADA COUNTY, MISSISSIPPI NO. 08-10-236-VC**

**KENT E. SMITH, MS BAR NO. [REDACTED]
Smith Whaley, P.L.L.C.
Attorneys at Law
Post Office Drawer 849
Holly Springs, Mississippi 38635
Phone (662) 252-3003**

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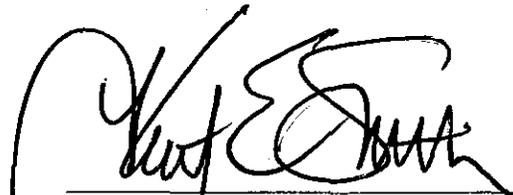
TEENA LYNETTE WILLIAMS BLAKELY

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. George Curtis Blakely, Jr.
Defendant-Mr. Blakely
2. Teena Lynette Williams Blakely
Plaintiff-Mrs. Blakely
3. Kent E. Smith, MS Bar No. 9031
Amanda Whaley Smith, MS Bar No. 100774
Smith Whaley, P.L.L.C.
P.O. Drawer 849
Holly Springs, Mississippi 38635
Counsel for Appellant
4. Luther P. Crull, Jr., MS Bar No. 7911
P.O. Box 2181
Grenada, Mississippi 38902
Counsel for Appellee
5. Honorable Vicki B. Cobb
Chancery Court Judge
P. O. Box 1104
112 Public Square
Batesville, MS 38606
Chancellor



KENT E. SMITH
Attorney of Record for Appellant,
Mr. George Curtis Blakely, Jr.

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STATEMENT OF ISSUES

- A. WHETHER CHANCELLOR ERRED IN DENYING CHILD SUPPORT AND CONTRIBUTION TO EDUCATIONAL EXPENSES FOR PARTIES' OLDER CHILD BASED SOLELY ON ESTRANGEMENT FROM MRS. BLAKELY?

- B. WHETHER THE CHANCELLOR ERRED IN APPLICATION OF *ALBRIGHT* FACTORS IN AWARDING CUSTODY OF YOUNGER CHILD TO MRS. BLAKELY?

STATEMENT OF THE CASE

This case arises from a hotly contested divorce and child custody action between the parties. The Blakelys were married for over twenty years, during which time Mrs. Blakely had multiple adulterous relationships, but was repeatedly forgiven by Mr. Blakely for her transgressions in an attempt to keep the family intact. (Tr., vol. 2, 216: 5-18, 225: 2-9). The marriage ultimately ended when the parties were granted a divorce on the grounds of irreconcilable differences on September 15, 2010. (R at 104).

A. PROCEDURAL HISTORY

This case was initiated when Mrs. Blakely filed for divorce on October 15, 2008, based upon the alleged fault grounds of habitual, cruel and inhuman treatment in which she sought custody of both the parties' minor children and other relief. (R at 6-15).

The matter was noticed for hearing by Mrs. Blakely on her Petition for Temporary Relief on January 12, 2009. (R at 44-45). On that date, both parties appeared in court, however, no hearing was held because Mrs. Blakely withdrew her Petition for Temporary Relief. (Tr., vol. 1, 84: 29, 85: 1-2).

The matter was not set again for any hearing until February 22, 2010. (R at 54-55). At the February 2010 hearing, the parties presented the Court with an Agreed Order, wherein Mr. Blakely was awarded physical custody of both minor children and Mrs. Blakely was granted visitation rights and ordered to pay five hundred dollars (\$500) per month in child support. (R at 56-58).

The case was finally tried on September 15, 2010. In the opinion entered on September 17, 2010, the Grenada County Chancery Court awarded custody of the parties' older child to Mr. Blakely by agreement and awarded custody of the parties' younger child to Mrs. Blakely. The Chancellor also denied any further child support or educational contribution for the older child;

awarded Mrs. Blakely child support for the younger child; and directed that both parties must pay one-half (½) of educational expenses, including private school tuition and college expenses for the younger child. (R at 121-122). A Final Judgment for Divorce consistent with the Court's opinion was entered on October 29, 2010. (R at 102-122). Mr. Blakely filed his Notice of Appeal from that judgment on November 24, 2010. (R at 130).

B. SUMMARY OF THE FACTS

The parties were married for some twenty years prior to their separation, and have two children – Kayla Blakely and Kurt Blakely. During the marriage, Mrs. Blakely engaged in multiple extramarital affairs, including one with her current paramour, Hayden Newton. (Tr., vol. 2, 225: 2-9). Shortly after beginning her relationship with Mr. Newton, Mrs. Blakely moved out of the marital bedroom and then filed for divorce on October 15, 2008. (Tr., vol. 1, 69: 17-29, 70: 21-23). Mrs. Blakely filed a notice of hearing for temporary relief to be heard on January 12, 2009, but voluntarily withdrew this request at Court but prior to the start of the scheduled hearing. (R at 44; Trial Tr., vol. 1, 84: 29, 85: 1-2). Despite the divorce filing, both parties remained in the marital home until approximately January 28, 2009, at which point there was a heated argument between the parties, and Mrs. Blakely decided to leave the home. (Tr., vol 1, 23: 13-14). At the time she left the home, Mrs. Blakely did not take either of the minor children with her. Mrs. Blakely did not call the matter up again for Temporary Relief until February 2010, approximately sixteen (16) months after separation. At the hearing, she voluntarily agreed to Mr. Blakely having custody of the children and payment of child support in the amount of five hundred dollars (\$500). (R at 56-58).

The only excuse offered by Mrs. Blakely for not seeking custodial or visitation rights through the Court for over sixteen (16) months from the date she filed for divorce was that she

thought that her older child, Kayla Blakely, would “lie or do whatever she had to do to hurt [her] and [she] didn’t want to put her in that position.” (Tr., vol 1, 113: 20-23). Mrs. Blakely claimed that her daughter told her that is what she would do, but no testimony to corroborate these statements was offered and due to time constraints placed by the Court Kayla Blakely did not testify on her own behalf to rebut these statements.¹

Mr. Blakely admittedly did not require the children to visit with their mother during the period prior to the entry of the Temporary Order. This is due to the fact that during the period of separation after the entry of the Temporary Order for Custody and Support, the parties’ children expressed opposition to spending time with their mother. (Tr. vol. 1, 36:16-19, 37: 28-29, vol. 2, 226:14-15). The parties’ older child, Kayla, particularly expressed animosity toward her mother. (Tr., vol. 1, 115:12-16). Once visitation was Ordered, the parties’ son, Kurt, exhibited hesitation to visit his mother and anxiety upon being forced to go. (Tr., vol. 1 41:12-15, 44: 24-29). At trial, Mrs. Blakely blamed Kurt’s apprehension during this time on Mr. Blakely and upon her daughter, Kayla, whom she claimed “poisoned her child” against her. (Tr., vol. 1, 37: 22-29, 41:29, 42:1). Despite this allegation, Mrs. Blakely offered no corroborated evidence of anything that either Mr. Blakely or Kayla Blakely said or did to cause Kurt Blakely to view his mother in a negative light. Save one derogatory statement, which Mrs. Blakely claims Mr. Blakely made in reference to her open extramarital affair with Hayden Newton when she was picking up Kurt Blakely for scheduled visitation, and another statement Mrs. Blakely claims was made by her

¹ Mr. Blakely would note for the Court that the trial court restricted the time for presentation of evidence to 2.5 hours per side without prior notice, where parties had not agreed to divorce prior to start of trial, and where all issues of property division, child support and child custody had yet to be determined. Counsel for Mr. Blakely informally raised its objection to this time restriction in chambers. However, no court reporter was present, therefore that objection is not reflected in the record and not preserved for Appeal.

daughter Kayla during a verbal altercation, Mrs. Blakely offered absolutely no evidence of statements by Mr. Blakely, Kayla Blakely, or any other individual which caused the rift between Mrs. Blakely and either of her children. (Tr., vol. 1, 39: 6-9, 105: 14-19). In fact, Mrs. Blakely's undisputed testimony was that she *never* heard Mr. Blakely make statements to poison the children against her; that she *never* heard anyone tell her son that he should hate his mother; or that she *never* heard anyone tell her child that he did not need to go and visit his mother. (Tr. vol. 1: 106: 14-29, 107: 1-10).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion, due to a blatantly obvious and overwhelming sympathy for Mrs. Blakely in this case, resulting in manifest error in its determination of child custody and erred as a matter of law in denying child support and education contribution for Kayla Blakely in this case.

Specifically, the trial court completely disregarded the guidelines provided in *Miss. Code Ann.* § 43-19-101 when it denied continued child support and contribution to educational expenses to the parties' oldest child solely based on animosity of the child toward her mother at the time of trial. Furthermore, the trial court denied the child any contribution from the mother based on her estrangement from the mother without regard for the complete circumstances in this case. In denying child support and educational expense contribution, the trial court placed absolute responsibility for the estrangement between mother and daughter on the child, and ignored the fact that the mother openly engaged in extramarital affairs during the marriage; including the affair that ultimately ended the marriage; the fact that Kayla Blakely was repeatedly made aware of by third parties, and the fact the mother repeatedly accused the child of promiscuity with married adult men from the time of the separation.

Furthermore, based on the same sympathetic bias, the trial court committed a manifest error in its application of the *Albright* factors in awarding custody of the parties' youngest child to Mrs. Blakely. The trial court again ignored the mother's open immoral behavior in carrying out multiple affairs, her obvious lack of parenting skills as demonstrated by her derogatory treatment of her daughter after the separation based on the child's alignment with Mr. Blakely, and the fact that continuity of care lay with the father for a thirteen month period preceding the entry of the Agreed Temporary Order, a time during which the mother voluntarily refrained from seeking any custodial or visitation rights.

ARGUMENT

A. THE TRIAL COURT ERRED IN ITS DENIAL OF CONTINUED CHILD SUPPORT AND EDUCATIONAL CONTRIBUTION TO THE PARTIES' OLDER CHILD

The trial court erred as a matter of law and committed a manifest error based upon abuse of discretion in denying the parties' oldest minor child, Kayla Blakely, any child support or contribution to educational expenses based upon the child's demonstrated animosity toward her mother since the parties' separation.

i. Denial of Child Support for Kayla Blakely

The trial court ceased child support payments by Mrs. Blakely for Kayla Blakely in any amount effective as of the entry of the Final Judgment. The court did so without any discussion of the statutory guidelines prescribed under *Miss. Code Ann.* § 43-19-101 (West 2011). *Miss. Code Ann.* 43-19-101(1) provides child-support guidelines that are entitled to a rebuttable presumption of correctness. *See Chesney v. Chesney*, 910 So.2d 1057, 1061 (Miss.2005). This Court has held that a Chancellor will not be affirmed in a child-support award that deviates from the statutory guidelines unless the chancellor "overcome[s] the rebuttable presumption ... by making an on-the-record finding that it would be unjust or inappropriate to apply the guidelines in the instant case." *Id.* No such finding was made by the Chancellor in this case.

Furthermore, it has been long settled that estrangement of a parent from the children is not a basis for deviation from statutory child-support guidelines and is not an excuse for failing to pay child support. *Lowrey v. Lowrey*, 919 So.2d 1112, 1118(¶ 21) (Miss.Ct.App.2005) *citing generally Shelnut v. Dep't of Human Servs.*, 9 So.3d 359, 364 (Miss.2009); *Cunliffe v. Swartzfager*, 437 So.2d 43, 45 (Miss.1983). The record in this case demonstrates that Kayla Blakely's relationship with her mother was strained long before the parties' separation and that the animosity toward her mother increased with the child's learning of her mother's extramarital

affairs from third parties, including her own aunt, and was strengthened by Mrs. Blakely's abandonment of the marriage and family in October 2008. (Tr., vol. 1, 39: 6-9, vol. 2, 193: 11-22, 224:11, 225: 2-13). Expert testimony provided at trial also demonstrated that Mrs. Blakely's own accusations of promiscuity and improper relationships between her daughter and older men also contributed to Kayla's disdain for her mother. (Tr., vol 2, 253: 26-29, 254: 1-18). In its Final Judgment, the trial court apparently wholly dismissed that Mrs. Blakely had *any* fault in the estrangement from her daughter, and in fact completely dismissed the mother's complete lack of morality and remorse in contributing to the demise of the marriage and family unit, placing the entire blame on Mr. Blakely and punishing the child for "lack of respect" for her mother where the mother had obviously not earned any through her behavior leading up to the divorce or since. (R at 122). However, no such evidence was presented to corroborate such a finding and the trial court did not clarify such a finding.

Courts award child support to the custodial parent for the benefit and protection of the child. *Lawrence v. Lawrence*, 574 So.2d 1376, 1381 (Miss.1991); *Cumberland v. Cumberland*, 564 So.2d 839, 847 (Miss.1990); *Nichols v. Tedder*, 547 So.2d 766, 781 (Miss.1989); *Alexander v. Alexander*, 494 So.2d 365, 368 (Miss.1986). The trial court's Final Judgment in this case demonstrates a complete lack of acknowledgement that Kayla Blakely deserved the same protection of the court system that was granted to her younger brother, Kurt. The trial court placed full blame and burden upon Kayla Blakely for the estrangement between mother and daughter, while completely ignoring Mrs. Blakely's contribution to the open animosity aimed at her mother by this child. Mr. Blakely respectfully submits that the trial court has committed a manifest error as a matter of law, as well as a blatant abuse of discretion in this case, by its denial

of any child support for Kayla Blakely and should be reversed as to this finding and an award should be rendered by this court consistent with the statutory guidelines.

ii. **Denial of Contribution to Educational Expenses for Kayla Blakely**

While Mr. Blakely acknowledges that this Court has recognized in extreme cases that a child's estrangement from a non-custodial parent may justify denial of educational expenses, this case is clearly distinct from the precedents on that issue. *Prestwood v. Hambrick*, 382 So.2d 474 (Miss. 1980) (holding that where the 19-year-old daughter intensely disliked her father, had had no contact with him for six or seven years, and did not want to have any contact with him, he could not be required to pay for her college education.)

As discussed above, the undisputed facts in this case show that Kayla Blakely's estrangement from her mother is the direct result of Mrs. Blakely's actions in engaging in multiple adulterous relationships during the course of the marriage, which ultimately resulted in the demise of her marriage and the familial unit, and Mrs. Blakely's derogatory accusations against her own daughter. The resulting animosity harbored by the daughter against her mother is based not on a long standing absence from the child's life, but upon fresh wounds inflicted upon the child's psyche as the result of the mother's own disregard for her children's emotional well-being. The trial court chose to ignore the facts presented on these issues, and rather focus on Mr. Blakely's negative view of Mrs. Blakely and place all the responsibility for the estrangement upon Mr. Blakely and upon the child with absolutely no responsibility given to the mother. For reasons unknown to Mr. Blakely, the trial court made its findings with an extreme sympathy for Mrs. Blakely in this case. **Such sympathy should not be the basis for a trial court's decision, but rather the law should be the guide when making such findings.**

There is nothing in the record to justify the trial court's withholding of educational

contribution from Kayla Blakely, save an uncorroborated allegation by Mrs. Blakely that her daughter once called her a whore out of anger, and the fact that the child did not want to visit with her mother since the separation of the parties. Therefore, Mr. Blakely respectfully submits this ruling by the Court should also be reversed as a result of this manifest error which resulted from abuse of discretion, and an award rendered in favor of Mr. Blakely for one-half (½) of Kayla Blakely's college education expenses to be paid by Mrs. Blakely.

B. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE *ALBRIGHT* FACTORS IN AWARDING CUSTODY OF THE PARTIES' YOUNGEST CHILD TO MRS. BLAKELY.

Although the trial court indicated in its Judgment of Divorce that it considered the child custody factors set forth in *Albright v. Albright* 437 So. 2d 1003 (Miss. 1983) in determining the appropriate parent to have paramount physical and legal custody of the minor child, it erred by weighing those factors in favor of Mrs. Blakely based on the evidence in this case. Specifically, the court weighted those factors as follows:

Factors favoring Mrs. Blakely:

- parenting skills and capacity to provide care;
- the employment of the parents and the employment responsibilities of the parent;
- continuity of care prior to the separation;

Factors favoring Mr. Blakely:

- emotional ties of the parent and child

Factors weighted neutrally:

- Age/health/sex of the child;
- physical and mental health of the parents;
- moral fitness;
- stability of the home environment;
- stability of employment of the parents;
- home/school and-community record of the child;

In order for a reviewing court to reverse the decision of the chancellor in an initial permanent child custody decision, the lower court must have been manifestly wrong, clearly erroneous or

applied an erroneous legal standard. *Weigaad v. Houghton*, 730 So. 2d 581 (Miss. 1999).

The chancellor was manifestly wrong and clearly erroneous in her analysis of the following factors as follows:

i. Parenting skills, willingness and capacity to provide care.

The trial court found that the parties' willingness and capacity to provide care were equal, but that Mrs. Blakely's parenting skills and capacity to provide care was superior to Mr. Blakely. (R at 117). In her written opinion, the Chancellor based her finding as to parenting skills upon the fact that Mr. Blakely did not force the children to speak to their mother by phone or go out of his way to foster the relationship between Mrs. Blakely and the children prior to the entry of the Agreed Temporary Order for Custody and Support in February 2010, and the fact that he allegedly became emotionally upset when his son began to cry when he left with Mrs. Blakely for scheduled visitation. (Tr., vol. 3, 305-06, 308-09). By this finding in favor of Mrs. Blakely, the Chancellor completely ignored and dismissed the fact that Mrs. Blakely repeatedly accused her own daughter of promiscuity since the separation; the fact that Mrs. Blakely refused to let the parties' son participate in scheduled baseball games when he was with her for visitation despite a request by the child to do so; and the fact that Mrs. Blakely voluntarily chose not to seek relief from the Court despite her claims that Mr. Blakely was "poisoning" her children against her for thirteen months after she moved out of the parties house. (Tr., vol. 1, 84: 29, 85: 1-2, 100: 14-23, 119: 1-6, vol. 2, 253: 29, 254: 1-18). Mrs. Blakely's lack of intervention in a situation, which she claims was so detrimental to her children's welfare (Tr., vol. 1, 119:1-9) demonstrates an obvious lack of parenting skills and concern for her children, not superiority as held by the Court.

Furthermore, Mrs. Blakely's history of extramarital affairs was not addressed by the trial Court with respect to parenting skills. While this court has held that "it is not the purpose of [appellate courts] to punish adultery, it is a factor to consider in awarding custody of minor children." *Mabus v. Mabus*, 890 So.2d 806, 817-18(46) (Miss.2003). In *Mabus*, the chancellor concluded that an affair "interfered with [the wife's] ability to effectively parent, regardless of whether the children knew of it." *Id.* In this case, the parties' children did know of their mother's extramarital relationships and testimony by Mr. Blakely evidenced the negative impact it had on the children. (Tr., vol. 2, 194: 11-23). Yet, the trial court did not even address this impact on the children in the Chancellor's analysis of best interests in weighing either the parenting skills or moral fitness factors.

This Court has further held that an affair can be weighed against a parent under the parental-skills factor when the affair causes the parent to spend time away from the family. *Copeland v. Copeland*, 904 So.2d 1066, 1076 (40) (Miss. 2004). Mrs. Blakely left the marital home in January 2009 and admits to immediately engaging in a sexual relationship with Hayden Newton. Based upon the testimony given by Mr. Newton, he and Mrs. Blakely were openly cultivating that relationship during the time that Mrs. Blakely was not burdened with caring for her children on a daily basis. (Tr., vol. 1, 121: 1-29 125: 29, 126: 1-28). Mr. Blakely respectfully submits that it was the affair with Hayden Newton that caused Mrs. Blakely not to seek any custodial rights or visitation of her children for nearly thirteen months after she moved out of the home, and not motherly concern for Kayla Blakely as stated by Mrs. Blakely, (Tr., vol 1, 113: 20-23), and that this should have been considered by the court in determining which parent had the best parenting skills.

Instead of looking at both parents objectively based upon the evidence adduced at trial, the trial court focused on Mr. Blakely's failure to "facilitate[e] visitation with Mrs. Blakely during the period of separation." (R at 117). The Court characterized this as a frustration of Mrs. Blakely's "efforts to have interaction and involvement with the children, thus creating a sense of alienation between the children and Mrs. Blakely. . ." *Id.* The court made this finding despite the fact there was **no evidence that Mr. Blakely frustrated or interfered with Mrs. Blakely's visitation after the Temporary Order was in place.** As with its erroneous denial of child support for Kayla Blakely, the Court again chose to place all of the blame for the children's relationship with their mother on someone other than Mrs. Blakely. This "mother", who the court found had the superior parenting skills, did not even do anything for her daughter Kayla's 17th birthday, at a time when she was still residing in the marital home, or 18th birthday which occurred after she had left the home, nor did she send Christmas gifts for either of her children in 2009. (Tr., vol. 2, 226:16-29, 227: 1-5). This sympathetic bias for Mrs. Blakely represents abuse of discretion by the trial court resulting in yet another manifest error in this case.

ii. **Employment of Parents and Employment Responsibilities of the Parents**

With respect to employment responsibilities of the parents, the Chancellor focused on the fact that Mrs. Blakely did not have to be at work until 8:30 a.m. in the mornings and could drop the youngest child off at school in the morning, whereas Mr. Blakely goes to work at 7:00 a.m. and would leave the child with a relative who would then take him to school and the fact that Mr. Blakely works half-days on Saturday. (R at 117-118). The Court abused its discretion in ignoring relevant facts in evidence in making this finding, specifically the fact that Mrs. Blakely expressed her intent to relocate with the child some 30 miles from the location of his school (Tr., vol. 1: 57: 7-10, 26-18), which would require the child to leave at approximately the same time

of morning to arrive at school on time, and the fact that Mr. Blakely had cared for the child for nearly two years by the time the divorce was final. During this time, Mr. Blakely more than adequately cared for the children despite his work schedule. Mr. Blakely respectfully submits that this fact should have been weighted equally as to both parties based on the evidence at trial, and that as with other factors that were not weighed properly the trial court's bias resulted in a manifest error.

iii. Continuity of care prior to the separation

With respect to continuity of care prior to the separation, the trial Court stated in its opinion that “[u]ndisputed testimony of the parties and the witnesses was that this factor favored Mrs. Blakely.” (R at 116). Specifically, the court in its findings discussed that Mrs. Blakely was “the primary disciplinarian and had primary care of the child prior to separation.” *Id.* The court likewise recognized in its findings that “Mr. Blakely was involved in recreation and sporting events of the children.” *Id.* These findings again completely ignore factual evidence as presented at trial. Both parties testified that they were equally involved in the children's school activities, including PTA and Booster Club. (Tr., vol. 1, 92: 2-29, vol. 2., 202: 1-26). Both parties and witnesses for both sides testified that the parties participated together in taking the children to church. (Tr., vol 1., 94: 24-29, 95: 1-29, vol. 2, 219: 14-27) Mrs. Blakely, herself, testified that Mr. Blakely's work schedule for much of the period immediately leading up to the separation was such that he routinely took the children to the doctor and other appointments after school because she was working. (Tr., vol. 1, 33: 4-11) Mrs. Blakely's testimony regarding primary care for the children focused on care provided when the children were infants, but these children are now ten (10) and nineteen (19) and Mr. Blakely was integrally involved in the care of his children equally with Mrs. Blakely during the years immediately preceding separation as

evidenced by their close relationship with their father.

In addition to the period prior to separation, this Court has held that the stability and continuity of a child's home environment between the time of the parents' separation and the entry of divorce is an important consideration when determining custody. *See, e.g., Jerome v. Stroud*, 689 So.2d 755, 757 (Miss.1997); *Law v. Page*, 618 So.2d 96, 102 (Miss.1993). The trial court completely dismissed the thirteen month period during which Mrs. Blakely voluntarily chose not to seek custody or visitation with her children, regardless of the alleged reason, as well as the eight months after the entry of an Agreed Order for temporary custody prior to trial when weighing continuity of care, except to place blame with Mr. Blakely for not going out of his way to allow Mrs. Blakely to care for the children. (R at 116-117). The Court abused its discretion in placing this blame with Mr. Blakely, where Mrs. Blakely had ample opportunity to be heard on her rights to visitation and custody in January 2009 and **voluntarily chose not to seek the same**. Despite testimony by Mrs. Blakely alleging that she did this for the sake of her daughter (Tr., vol. 1, 113: 21-23), the evidence clearly demonstrates what Mrs. Blakely was focused on during this period of time when she was not caring for her children – her new lover, Hayden Newton.

Based upon the testimony given by Mr. Newton at trial, he and Mrs. Blakely escalated their relationship to a sexual one around the same time that Mrs. Blakely finally moved out of the marital home and that they were openly cultivating that relationship during the time that Mrs. Blakely was not constrained with caring for her children on a daily basis. (Tr., vol. 1, 121: 1-29 125: 29, 126: 1-28). In fact, Mrs. Blakely was not only free from the responsibility of physically caring for her children during this period, but she also did not have to contribute to the financial responsibilities of caring for her children until ordered by the Court to do so in February 2010. (Tr., vol. 1, 78: 2-29, 79: 1-22).

There was no corroborated testimony offered by Mrs. Blakely as to attempts she made to repair the damaged relationship with her children during this time period. Although she did testify that she called on a few occasions, Mrs. Blakely did not return to the marital home to see the children between January 2009 and August 2009. (Tr., vol. 2, 226: 7-15).

The only testimony offered regarding Mrs. Blakely trying to see her children prior to the entry of the Temporary Order was that she attended at least one baseball game where her son was playing; that Mr. Blakely allowed the children to spend Kurt's 9th birthday with Mrs. Blakely at her mother's home; and that she went to the home of Mr. Blakely on one occasion, when he was not there, and that the police were called as the result of a verbal altercation between Mrs. Blakely and her daughter. (Tr., vol. 1, 37: 4-5, 39: 1-9, 83: 24-29, 84: 1-13). Mrs. Blakely did testify that she tried to reach her daughter, Kayla by texting and buying her a graduation gift, but that relationship was so strained that she eventually abandoned her request for custody of Kayla. (Tr., vol. 1, 111: 9-20). Furthermore, when contacted by the children's counselor, Ms. Sandra Harvey, about ways that the counselor felt the relationship with the children could be repaired or improved, Mrs. Blakely's only response was to attack her daughter by making allegations and innuendo regarding the child's relationships with various men and to state that she didn't feel that Kurt needed to talk to his dad when he was with her during visitation. (Tr., vol. 2, 253: 9-29, 254: 1-18).

The only stability in the lives of both of the parties' children was provided by Mr. Blakely prior to the entry of the Final Judgment in this case, whereby Kurt Blakely, a nine year old boy was removed from the primary custody of his father, with whom he has an extremely close bond, and sent to live with his mother who admittedly intended to relocate the child to a home owned by her boyfriend some thirty miles away. The trial Court committed a manifest

error based on abuse of discretion in weighing continuity of care in favor of Mrs. Blakely and in its ultimate determination that because of the weight of this factor that it was in the best interests of Kurt Blakely to be placed in the primary physical custody of his mother.

iv. Moral fitness

The standards established in *Albright* dictate that “difference in religion, personal values and lifestyles” would not be the sole basis for custody decisions. *Albright*, at 1005. In addition, the Supreme Court has held that chancellors should not place too much weight on the “moral fitness” factor based upon a party's sexual activities. *Hollon v. Hollon*, 784 So.2d 943, 949–50 (¶¶ 25–27) (Miss.2001)(reversing the chancery court's decision which relied heavily on the parent's homosexual affair). *See also, Lawrence v. Lawrence*, 956 So.2d 251, 260-61 (¶ 34) (Miss.App.2006)(moral factor favored neither party where both had engaged in affairs outside marriage). The trial court in this case found that neither party was favored when considering the factor of moral fitness. (R at 119.)

Mr. Blakely respectfully argues that although the Court did recognize that Mrs. Blakely had engaged in at least one, if not multiple extramarital affairs, it did not address the impact of these affairs on the children’s well-being and therefore did not properly analyze the moral fitness factor in this case, largely because the Court was fixated on its disdain for Mr. Blakely as at length discussed above. For example, it is undisputed that Kayla Blakely was negatively impacted by her mother’s repeated extramarital affairs. (Tr., vol. 2, 194: 11-23). Although Mrs. Blakely abandoned any argument for custody of Kayla at trial, the obvious negative impact as to one child should be considered as part of the totality of the circumstances when making a decision on which parent would be favored based on moral fitness and also in making a final determination of custody based upon the best interests of the other child. Therefore, Mr. Blakely

submits that the Chancellor did not properly address moral fitness factor under *Albright* in its final opinion and that reversal and remand for full consideration is appropriate based on this manifest error.

CONCLUSION

The trial court abused its discretion and committed manifest error in its determination of child custody and erred in its application of the law in its denial of child support and educational contribution for Kayla Blakely in this case.

This court should reverse and render an award for child support consistent with *Miss. Code Ann.* § 43-19-101, because the trial court completely disregarded the statutory child support guidelines when it denied continued child support and contribution to educational expenses to the parties' oldest child solely based on animosity of the child toward her mother at the time of trial.

Furthermore, based on an overt sympathetic bias, the trial court committed a manifest error in its application of the *Albright* factors in awarding custody of the parties' youngest child to Mrs. Blakely. Specifically, the court abused its discretion in finding that parenting skills, employment responsibilities and continuity of care weighed in favor of Mrs. Blakely based upon the evidence adduced at trial, and failed to properly consider mother's open immoral behavior in carrying out multiple affairs when considering the impact of moral fitness on the best interests of the children.

Based upon these manifest errors, this Court should reverse and remand with instructions to enter judgment consistent with the Temporary Order granting Mr. Blakely primary physical custody of both of the parties' minor children with periods of visitation to be determined by the trial court and awarding child support and educational contribution for both children to Mr. Blakely.

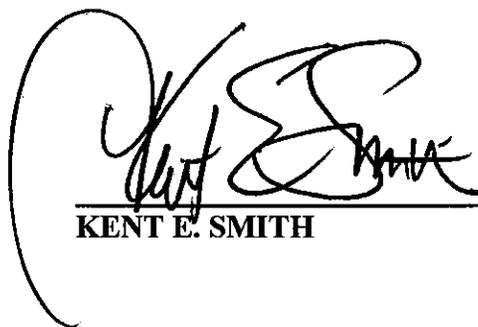
CERTIFICATE OF FILING AND SERVICE

I, **KENT E. SMITH**, attorney of record for Appellant, George Curtis Blakely, Jr., do hereby certify that I have this day mailed a true and correct copy of the foregoing Brief for Appellant and Record Excerpts for Appellant by U.S. Mail, first-class postage prepaid, to the following at their usual mailing address:

1. Luther P. Crull, Jr., MS Bar No. 7911
P.O. Box 2181
Grenada, Mississippi 38902
Counsel for Appellee

2. Honorable Vicki B. Cobb
Chancery Court Judge
P.O. Box 1104
112 Public Square
Batesville, MS 38606
Chancellor

SO CERTIFIED that I have deposited the Brief of Appellant and Record Excerpts for Appellant in the United States mail on this the 25th day July, 2011.



KENT E. SMITH