2011-CA-00192 T

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. Alisa Gale Rolison, Appellant
2. Gary Wayne Rolison, Jr., Appellee
3. Jak M. Smith, counsel for Appellee
4. Jason Shelton, counsel for Appellant
5. R. Shane McLaughlin, counsel for Appellant

R. Shane McLaughlin
Attorney of record for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

The issues in this appeal are straightforward and require reversal. While Appellant's counsel would welcome the opportunity to present this case orally, oral argument is not necessary to an understanding of the issues in this case.

STATEMENT OF THE ISSUES

1. Whether the Chancellor erred in failing to apply the presumption of Miss. Code Ann. § 93-5-24(9)(a) based on the record-evidence of family violence and in failing to explain why the presumption was or was not triggered.
2. Whether the Chancellor erred in failing to follow the guardian *ad litem*'s recommendation and in failing to provide detailed reasons for rejecting the recommendation.
3. Whether the Chancellor erred in rejecting the children's preferences and in failing to provide reasons for rejecting the preferences.
4. Whether the Chancellor erred by awarding custody to Gary as a punishment for Alisa's adultery.

STATEMENT OF THE CASE

Gary Rolison ("Gary") and Alisa Rolison ("Alisa") filed a joint complaint for an irreconcilable differences divorce. (C.P. p. 9)[1]. However, Alisa subsequently withdrew her consent for an irreconcilable differences divorce. (C.P. p. 20). Gary filed an Amended Complaint for divorce based on habitual cruel and inhuman treatment and adultery. (C.P. p. 21-22). The Court entered a Temporary Order on July 9, 2009. (C.P. p. 38).

On December 16, 2009, following allegations of abuse of the minor children, the Court appointed a guardian *ad litem*. (C.P. p. 64). The guardian *ad litem* rendered a report and recommendation on September 9, 2010. (C.P. p. 115).

The Court bifurcated this case into issues of grounds for divorce and child custody and property division issues. (*See* T. p. 5; C.P. p. 132). The Court entered an Interim Order on December 16, 2010, awarding custody of the children to Gary. (C.P. p. 132-134).

The Court entered a Final Judgment on January 28, 2011. (C.P. p. 138). Alisa timely perfected this appeal. (C.P. p. 148).

[1] Clerk's Papers are cited as "C.P." and the trial transcript is cited as "T."

STATEMENT OF FACTS

Gary and Alisa Rolison separated in December 2008. (T. p. 185). Gary and Alisa have four children: Melissa, Andrew, Rachel, and Anna Kate. (T. p. 51). At the time of trial, Melissa was seventeen years old, Andrew was fifteen, Rachel was twelve, and Anna Kate was four. (T. p. 51). Alisa is a special education teacher at Ripley Middle School. (T. p. 54). Gary works for his family's timber business in Ripley. (T. p. 160).

Alisa claimed at trial that she was the primary caregiver for the children and that Gary rarely cared for them. (T. p. 34). Alisa had been treated for mental health impairments such as bipolar disorder. (T. p. 33, 36). Alisa was on medication for depression and bipolar disorder. (T. p. 36). However, Alisa maintained that she was fully capable of caring for her children. (*See, e.g.,* T. p. 34).

There was much evidence of violence and abuse perpetrated by Gary adduced at trial. These instances included the following: 1) locking Melissa out of the house on a cold night; 2) ordering Rachel to throw heavy, steel-toed boots at Melissa; 3) beating Alisa with a "stacking stick"; 4) dragging Alisa by her hair and kicking her; 5) pushing and shoving Andrew on several occasions; 5) hitting Andrew in the head on one occasion; 6) threatening to kill Alisa; 7) spanking the children so hard that it caused bruises; and 8) verbally abusing Alisa and the children. (T. p. 40-47, 191-92, 203, 359, 360).

Gary admitted that he spanked the children to such an extent that they were bruised. (T. p. 191-92). Gary testified that he used to whip the children with a belt but he stopped hitting them with a belt after Judge Alderson ordered him to refrain from that method of discipline. (T. p. 191). The Record contains photographs of severe bruises on Melissa which can be seen from

a distance during a cheerleading performance. (Trial Exhibit No. 9).[2] Gary admitted he caused the bruises by whipping the teenager. (T. p. 191-92).

Gary Wayne also admitted he locked Melissa out of the house, during a winter night, on one occasion while the child was wearing her pajamas. (T. p. 195). Gary admitted he forced Melissa to the ground by her shoulder to make her pick up a cup on the floor. (T. p. 197-98, 203). Melissa claimed that during the same incident Gary kicked her with his boot. (T. p. 298). Melissa also claimed Gary previously hit her in the face with a belt. (T. p. 310). Additionally, Gary was concerned that Melissa had a mental illness and admitted to telling her she was "acting retarded." (T. p. 203). Melissa testified that her father "loses control" when he gets angry. (T. p. 311). Gary admitted that he suffered from an "anger problem." (T. p. 167).

Alisa testified that she feared for her children's safety when they were with Gary and that she left Gary because he was abusive and because she wanted to get her children away from him. (T. p. 46, 59). Alisa also testified that she has called the police on Gary in the past and has had police reports made. (T. p. 98). Carolyn Craft, Alisa's mother, likewise testified that Gary had a bad temper and that she personally witnessed Gary treating the children badly. (T. p. 483, 487).

Gary, on the other hand, denied physical abuse toward Alisa and denied that he threatened to kill Alisa. (T. p. 110-11). Gary also claimed that Alisa was more aggressive toward the children. (T. p. 111). However, Gary did not deny the allegations of physical abuse toward the children and admitted to using inappropriate language around Alisa and the children. (T. p. 191-206).

Melissa, the seventeen-year-old, expressed a preference at trial to live with her mother. (T. p. 295). Andrew, the fifteen-year-old, expressed a desire to split time between Alisa and

[2] The photographs in Exhibit 9 reflect several different instances of bruises and marks Gary left on Melissa. (See T. p. 305-11).

Gary, but testified that if he had to choose, he would rather live with Alisa. (T. p. 379-80). Rachel, the twelve-year-old, did not express a preference and wanted to split time equally between Gary and Alisa. (T. p. 383). Anna Kate, being only four (4) years old, was not of age to express a preference. (*See* T. p. 51).

Following trial, Judge Alderson granted a divorce between Gary and Alisa on the grounds of adultery. (T. p. 576). Alisa admitted an adulterous relationship at trial. (T. p. 9-10).

As to the custody issues, Judge Alderson received recommendations from the guardian *ad litem* and the Department of Human Services. (T. p. 582). Both the guardian *ad litem's* report and the DHS report recommended that Alisa be awarded custody of Melissa and Gary be awarded custody of the youngest three children. (T. p. 587). Judge Alderson, however, declined to follow those recommendations and awarded custody of the four children to Gary. (T. p. 588). Part of Judge Alderson's opinion was as follows:

> I'm going to award custody of the four children to the father. And I'm doing this, mother, to punish you, I'm thinking of the children. I think basically you are a good woman, but you've got to get your life together. You've made a mess out of it. Daddy you are not home free, if you don't change and you don't get positive attitude toward you, you are going to have some problems, do you understand me?

(T. p. 588).

Aggrieved by the Chancellor's custody decision, Alisa perfected this appeal.

STANDARD OF REVIEW

The scope of review of a Chancellor's custody determination is whether the Chancellor abused his discretion, was manifestly wrong or clearly erroneous 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.

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. However, where a chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error. *Brekeen v. Brekeen*, 880 So. 2d 280, 283 (Miss. 2004).

SUMMARY OF THE ARGUMENTS

Mississippi Code section 93-5-24(9)(a) creates a rebuttable presumption that custody should not be placed with a parent with a "history of family violence." The evidence at trial demonstrated a pattern of many incidents of family violence committed by Gary Rolison. The Chancellor should have applied the presumption required by section 93-5-24. Further, the statute required the Chancellor to make written findings as to why the presumption was or was not triggered. The Chancellor did not make such findings in this case. Accordingly, for these reasons, the Chancellor's decision should be reversed. The Court should hold that the presumption of section 93-5-24 should be applied against Gary Rolison in this case.

Additionally, the Chancellor erred by failing to follow the recommendation of the guardian *ad litem* and by failing to explain his reasons for rejecting the guardian *ad litem*'s recommendation. The appointment of a guardian *ad litem* was mandatory in this case based on the allegations of physical abuse. The Chancellor rejected the guardian *ad litem*'s recommendation without explanation for the reasons for the rejection. The Chancellor erred in this regard.

Similarly, the Chancellor erred in disregarding the preferences of two of the children who stated a preference to reside with their mother, including the preference of seventeen year old Melissa. The Chancellor also erred in failing to make on-the-record findings as to why the children's expressed preferences would not serve their best interests.

Finally, the Chancellor erred by awarding custody based on a desire to punish Alisa for marital fault. On this ground as well the Chancellor's decision should be reversed.

ARGUMENT I.

THE CHANCELLOR ERRED IN DISREGARDING THE PRESUMPTION RAISED BY GARY'S PATTERN OF VIOLENCE.

Mississippi Code section 93-5-24 provides as follows:

> In every proceeding where the custody of a child is in dispute, there shall be a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence. The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against, the party making the allegation or a family household member of either party. The court shall make written findings to document how and why the presumption was or was not triggered.
>
> (ii) This presumption may only be rebutted by a preponderance of the evidence.
>
> (iii) In determining whether the presumption set forth in subsection (9) has been overcome, the court shall consider all of the following factors:
>
> 1. Whether the perpetrator of family violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child because of the other parent's absence, mental illness, substance abuse or such other circumstances which affect the best interest of the child or children;
>
> 2. Whether the perpetrator has successfully completed a batterer's treatment program;
>
> 3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate;
>
> 4. Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate;
>
> 5. If the perpetrator is on probation or parole, whether he or she is restrained by a protective order granted after a hearing, and whether he or she has complied with its terms and conditions; and
>
> 6. Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(iv) The court shall make written findings to document how and why the presumption was or was not rebutted.

MISS. CODE ANN. § 93-5-24(9)(a).

At trial, Alisa expressly argued that this presumption should apply due to Gary's numerous acts of violence. (T. p. 568). The Chancellor found that Gary had been "aggressive at times" with the children. (T. p. 580; *see also* T. p. 584). However, the Chancellor did not address the statute or the rebuttal presumption in his ruling. (T. p. 576-88). The Chancellor did not make any findings as to how or why the presumption was or was not triggered.

This Court will reverse where the Chancellor fails to properly apply section 93-5-24 or where the Chancellor fails to make findings as to whether the presumption was triggered. *Lawrence v. Lawrence*, 956 So. 2d 251, 263 (Miss. Ct. App. 2006).

Gary admitted to several instances of violence, particularly toward his oldest child Melissa. Gary admitted that he "spanked" the children until they were bruised. (T. p. 191). Gary admitted he had whipped Melissa with a belt such that the bruises can be seen in exhibit number 9. (T. p. 192; Trial Exhibit No. 9). Gary admitted he forced Melissa to the ground by her shoulders. (T. p. 197-98). Similarly, Alisa testified that Gary once beat her with a 2 x 2 "stacking stick" when she let a cow escape a gate such that she could barely walk the next day. (T. p. 41).

There was overwhelming evidence at trial sufficient to trigger the presumption in Mississippi Code section 93-5-24(9)(a). Indeed, there was enough evidence to trigger the presumption based merely on Gary's admissions at trial, much less the other allegations made by Alisa.

The Chancellor erred in two respects in this regard. The Chancellor erred by failing to apply the presumption of section 93-5-24(9)(a) and by failing to make written findings as to whether the presumption was triggered as the statute requires.

Accordingly, on this basis, the Chancellor's decision should be reversed with instructions to properly apply the presumption of section 93-5-24(9)(a).

ARGUMENT II.

THE CHANCELLOR ERRED BY FAILING TO FOLLOW THE GUARDIAN *AD LITEM*'S RECOMMENDATION AND BY FAILING TO EXPLAIN THE REASONS FOR REJECTING THE RECOMMENDATION.

The Court appointed a guardian *ad litem* due to the allegations of abuse of the children by Gary. (*See* T. p. 2). The Guardian *ad litem* report recommended that custody of Melissa be awarded to Alisa and Gary be awarded custody of the three other children. (C.P. p. 121). The Chancellor did not follow the guardian *ad litem*'s recommendation. (T. p. 587-88). The Chancellor stated that he considered the guardian *ad litem*'s report and that this case was the first time he had not accepted a recommendation from a guardian *ad litem*. (T. p 582, 587-88).

A Chancellor is required to appoint a guardian *ad litem* in cases where allegations of abuse or neglect are made. MISS. CODE ANN. § 93-5-23. Where the appointment of a guardian *ad litem* is mandatory and the Chancellor does not follow the guardian *ad litem*'s recommendation, the Chancellor should include his reasons for rejecting the recommendation. *Floyd v. Floyd*, 949 So. 2d 26, 29 (Miss. 2007). However, the Chancellor is not bound by the guardian *ad litem*'s recommendation. *Floyd*, 949 So. 2d at 29.

The appointment of a guardian *ad litem* was mandatory in this case due to the allegations of abuse by Gary. The Chancellor here did not follow the recommendation of the guardian *ad litem* and did not provide reasons for rejecting the recommendation.

The Chancellor's decision should be reversed and remanded on this basis.

ARGUMENT III.

THE CHANCELLOR ERRED IN REFUSING TO CONSIDER THE CHILDREN'S PREFERENCES AND BY FAILING TO EXPLAIN WHY THE PREFERENCES WERE NOT HONORED.

Children over the age of twelve are entitled to state a preference as to the parent with whom the child will reside. MISS. CODE ANN. § 93-11-65. While the preference is not binding on the Court, if the Chancellor denies the child's wishes the Chancellor must "explain in detail" why the child's wishes were not honored. *Id.*

That is, when a child's preference is not followed, the Chancellor must make on-the-record findings as to why the preference will not serve the child's best interests. *Polk v. Polk*, 589 So.2d 123, 130 (Miss. 1991). This Court will reverse where a Chancellor fails to explain why a child's preference is not followed. *Floyd*, 949 So. 2d at 30.

Three of the four children in this case were of age to express a preference at trial. Melissa, who was seventeen, expressed an unequivocal preference to live with Alisa. Andrew, who was fifteen, expressed that he wanted to split time between his parents but, if he had to choose, he would prefer to live with his mother. Rachel was of age to express a preference but did not do so. Rachel testified she wanted to split time equally between her parents.

The Chancellor acknowledged the children's preferences but, other than the discussion of the *Albright* factors, failed to explain why the preferences were not followed. The Chancellor erred in failing to at least explain why he refused to follow the children's stated preferences. The Chancellor disregarded the preferences of both Melissa and Andrew without articulating any detailed reasons. While this was error as to both children, the error is acutely evident as to Melissa, who was seventeen years old and for whom the guardian *ad litem* also recommended that custody be awarded to Alisa. The Chancellor's decision should be reversed in this regard.

ARGUMENT IV.

THE CHANCELLOR ERRED BY AWARDING CUSTODY BASED ON PUNISHMENT FOR ALISA FOR ENGAGING IN AN AFFAIR.

The Mississippi Supreme Court has held that a Chancellor may not punish a party for marital fault in making the custody determination. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983); *Brekeen v. Brekeen*, 880 So. 2d 280, 287 (Miss. 2004). Moreover, the Chancellor should not place more emphasis on marital fault, such as adultery, than that placed on the other *Albright* factors. *Brekeen*, 880 So. 2d at 285-86.

The Chancellor in this case did perform an on-the-record *Albright* analysis. (T. p. 582-88). However, the Transcript reflects the following portion of the Chancellor's ruling:

> I'm going to award custody of the four children to the father. ***And I'm doing this, mother, to punish you, I'm thinking of the children.*** I think basically you are a good woman, but you've got to get your life together. You've made a mess out of it.

(T. p. 588; emphasis added).

The Chancellor stated that he was awarding custody to Gary as punishment to Alisa. Ostensibly, based on the Chancellor's ruling and repeated references to Alisa's adultery during trial and the ruling, the Chancellor punished Alisa for her affair by awarding custody of all of the children to Gary.

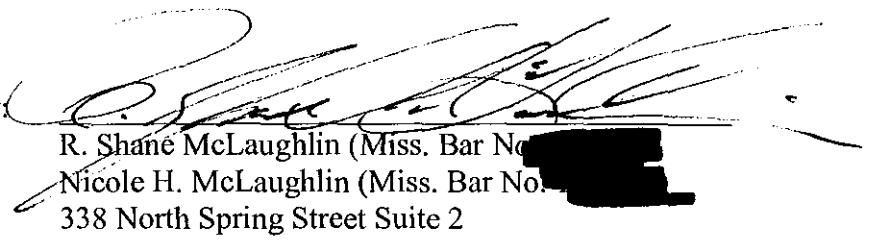
This was manifest error pursuant to Supreme Court precedent. The Chancellor's decision should also be reversed in this regard.

CONCLUSION

For all of the above and foregoing reasons the Chancellor's decision should be reversed.

RESPECTFULLY SUBMITTED, this the 21st day of October, 2011.

MCLAUGHLIN LAW FIRM

By: 

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CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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Hon. Glenn Alderson
Chancellor
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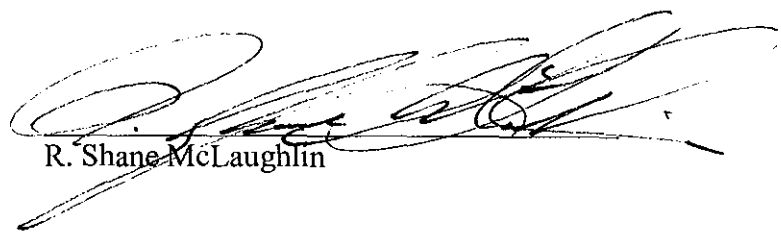
Oxford, Mississippi 38655

This the 21st day of October, 2011.



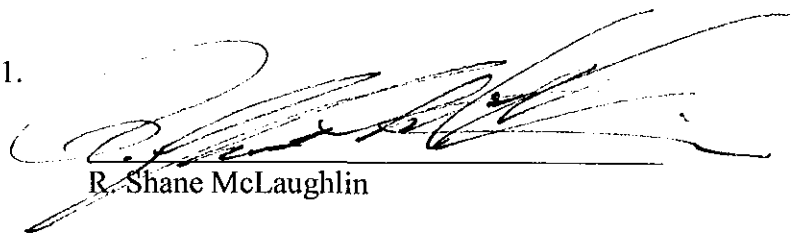
R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Supreme Court Clerk
P.O. Box 249
Jackson, MS 38295-0248

This, the 21st day of October, 2011.



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