

**IN THE  
SUPREME COURT OF MISSISSIPPI**

**Docket No. 2011-TS-01307**

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**KIMBERLY ANNE COLLINS**

*Appellant*

**v.**

**ROBERT JARRAD COLLINS**

*Appellee.*

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**Appeal from the Chancery Court  
of Lee County, Mississippi**

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**BRIEF OF THE APPELLEE**

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**Oral Argument Not Requested**

**Will R. Ford, Esquire  
Post Office Box 890  
121 East Bankhead Street  
New Albany, Mississippi 38652  
Telephone: (662) 534-9573  
Facsimile: (662) 534-9574  
MS Bar No. [REDACTED]**

**ATTORNEY FOR APPELLEE**

# **CERTIFICATE OF INTERESTED PERSONS**

**Docket No. 2011-TS-01307**

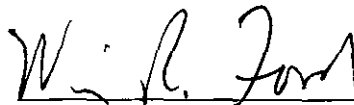
**Kimberly Anne Collins, Appellant**

**v.**

**Robert Jarrad Collins, Appellee.**

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

- Kimberly Anne Collins, Appellant
- Robert Jarrad Collins, Appellee
- Chancellor Michael Malski
- M. Craig Robertson, Attorney for the Appellant
- Jeremy P. McNinch, Attorney for the Appellant
- Matthew S. Easterling, Attorney for the Appellant
- Will R. Ford, Attorney for the Appellee



Will R. Ford (MSF [REDACTED])  
Attorney for Appellee

## TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF THE ARGUMENT .....	11
ARGUMENT .....	12
CONCLUSION .....	18
CERTIFICATE OF SERVICE .....	19

## TABLE OF AUTHORITIES

Cases	Page
<u>Albright v. Albright</u> , 437 So.2d 1003, 1005 (Miss. 1983) .....	11, 15
<u>Bower v. Bower</u> , 758 So.2d 405 (Miss. 2000) .....	13
<u>Howard v. Fulcher</u> , 806 So.2d 328 (Miss. App. 2002) .....	13
<u>In Re: E.C.P.</u> , 918 So.2d 809 (Miss. App. 2005) .....	12, 13
<u>Jones v. Jones</u> , 19 So.3d 775 (Miss. Court of Appeals 2009) .....	15
<u>Myers v. Myers</u> , 814 So.2d 833 (Miss. App. 2002) .....	14
<u>Norman v. Norman</u> , 962 So.2d 718 (Miss. App. 2007) .....	13
<u>Porter v. Porter</u> , 23 So.3d 438 (Miss. 2009) .....	14
<u>Reddell v. Reddell</u> , 696 So.2d 287 (Miss. 1997) .....	13
<u>Saliba v. Saliba</u> , 753 So.2d 1095 (Miss. 2000) .....	12
<u>Sarver v. Sarver</u> , 687 So.2d 749 (Miss. 1997) .....	12
<u>Woodham v. Woodham</u> , 17 So.3d 153 (Miss. App. 2009) .....	17

## **STATEMENT OF THE ISSUES**

**THE CHANCELLOR DID NOT ABUSE HIS DISCRETION, NOR WAS HE MANIFESTLY WRONG OR IN ERROR IN AWARDING PHYSICAL CUSTODY OF THE MINOR CHILD TO ROBERT JARRAD COLLINS.**

## STATEMENT OF THE CASE<sup>1</sup>

On June 11, 2010, the Appellant Kim Collins (hereinafter referred to as “Kim”) began these proceedings by filing a Complaint for Divorce (R.2). The Appellee, Robert Jarrad Collins (hereinafter referred to as “Jarrad”) filed an Answer and Counter-Complaint for Divorce on the grounds of adultery. Both parties sought custody of the minor child, Robert Conner Collins, (hereinafter referred to as “Conner”) born February 28, 2006 (R.9). The parties were married on June 9, 2001 and separated in June, 2010 (R.E.3). The trial lasted two days – September 29, 2010 and December 8, 2010. Kim’s case consisted of calling Jarrad as an adverse witness and presenting testimony on her own behalf. Jarrad presented seven witnesses, including himself.

Jarrad testified that he has been a pharmaceutical representative for 11 years (T.50) and calls on North Mississippi Medical Clinics and that 70% are in the Tupelo area (T.21). He was district rep of the year for two years – 2006-2007 (T.164). Jarrad testified that Kim moved out of the family home in Tupelo the first week of June, 2010 while he and Conner were gone. Kim admitted that she was having an adulterous relationship with Austin Haley (hereinafter “Haley”) (T.10). Kim told Jarrad that she was having an affair and was in love with Haley (T.8-10). Kim and Haley started seeing each other in October, 2008 when Conner was two and a half years old (T.16, 199).

Their child, Conner, was born on February 28, 2006 (T.16). He is in good health but

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All references to the relevant records, trial transcripts, record excerpts and exhibits are referenced to herein as follows: “R” is Court Record; “T” is Transcript; “R.E.” is Appellants Record Excerpts and “Ex” is exhibits. Appellant’s Record Excerpts do not include pages 256, 260, 262, 264-265, 269, 272-273 of the chancellor’s September 1, 2011 Bench ruling.

takes Singulair and Nasonex for his allergies (T.17). On the average day, Jarrad took Conner to school and Kim would pick him up and take him to the babysitter or bring him home. When Jarrad came home, Kim would leave and stay gone for hours to work out or whatever she was doing. Afterward she would come home and get in the bathtub and stay for two hours (T. 200). Jarrad would give Conner his bath and cook supper. He took him to school every day (T.18). After the separation, Kim would pick Conner up a few times at Pre-K (T.19). They had a baby sitter named Cici who lives in the neighborhood but stopped using her for a short time (T.19). Then Jarrad came home one day in May, 2010 and Kim was stressed out. She said, "I can't do it all. I can't- I can't work and keep Conner at the same time." They started using Cici again (T.20). Jarrad testified that his job is very flexible and that his days revolve around what Conner needs (T.22). Jarrad and Kim both cleaned the house and did the laundry. Kim is a bad mother because her priorities are messed up (T.26). Conner needs a permanent residence and 2604 East Bay is where he calls home. Jarrad has job flexibility (T.27). He found out for sure that she was having an affair with Haley on July 8, 2009 (T.10, 214). Photographs were introduced (Ex.3 and 5) which included Kim going to Las Vegas in 2009 for over 9 days in April, running a marathon in Nashville in 2009 and 2010 and going to Destin, Florida on a Wednesday through Sunday in May, 2010 without Conner or Jarrad (T.83, 96, 107, 190, 192). Conner and Jarrad did not go on any of these trips (T.195). Kim admitted a sexual relationship with Haley in Florence, Alabama; Ridgeland, Mississippi, Birmingham, Alabama (T. 107, 199) Tunica, Mississippi; and Cullman, Alabama (T. 83, 96, 107, 201)

Jarrad testified that Kim went on a Las Vegas trip in 2009 and was gone 9 days. In

May, 2009 and April, 2010, she was in Nashville running a marathon; in May, 2010 she went to Florida. Jarrad took care of Conner while she was with Haley in Alabama and when she was going on all of these trips (Ex.3, 5). The phone summaries show 499 telephone calls between Haley and Kim for a total of 196 hours (Ex.11).

Kim falsely testified that she hadn't seen or talked to Haley since late July or August, 2010. However, Jarrad testified and Exhibit 11 clearly shows that in September 2010, there were 38 calls between Kim and Haley for 13 1/2 hours and 1,479 text messages (T.197). Haley and Kim talked on the phone three times totaling 81.62 minutes on September 29, 2010, the first day of the trial. The summaries of the text and telephone calls were introduced as Exhibit 11 (T.197).

Kim admitted clandestine meetings with Haley in Florence, Alabama; Ridgeland, Mississippi, Birmingham, Alabama, Tunica, Mississippi and Cullman Alabama while Jarrad was taking care of the child (T. 83, 96, 107). Kim's trips to Ridgeland increased. She wouldn't tell her parents she was coming to Ridgeland. Conner would be with Jarrad. After Jarrad got the GPS device, he could tell where she was going. She lied continuously about where she was (T.200). Kim admitted to Jarrad that she was in love with Haley. Kim just wants to move to Nashville and marry Austin Haley (T.201). Her sister lives in Nashville and Haley lives just north of Nashville (T.201). She was with Haley in Birmingham and Jarrad's brother Darren Collins videoed them coming out of the hotel (Ex. 10, T.202). The parties were still living together when next door neighbor Shelly Boswell observed a man pushing a motorcycle out of Kim's garage around 11:00 p.m., pushing it down the street and driving away (T.204). The adulterous relationship with Haley started in 2008 when Conner



was only 2 years old (T.205). Kim was constantly talking on the phone to Haley before and after they had the marriage counseling sessions in Memphis (T.214).

Kim admitted a sexual relationship with Haley and but said that the affair began in March, 2009 (T.54). Kim is the sole shareholder of a public relations firm which she started in 2008 and has only two or three retainer clients (T.55-56). She moved out of the family home in the Summer of 2010 to an apartment (T.56). She has business in the Ridgeland and Jackson area. Her parents live in Brandon (T.57). She admitted that she would go to the gym four out of five nights during the week (T.62). She testified that Conner does not have diagnosed asthma (T.64). She admits that Jarrad goes outside to smoke (T.65). She admits that Jarrad is a fun dad, good at games and having fun and that Jarrad is not a bad person. She's not worried about Conner being with Jarrad or his safety (T.65-66). Kim testified that she has no problem with joint legal custody (T.69). She drinks wine on occasion (T.71).

Exhibit 11 reflects that there were 7,161 texts and 499 telephone calls totaling 196 hours between Kim and Haley. One hundred sixty one of these calls were made between 5:00 p.m. and midnight when Conner would have been at home and 82 calls between the hours of 12:00 p.m. and 5:00 p.m., as well 4,429 text messages during that time between Kim and Haley when Conner was at home with Kim (T.80, Ex.11). Between April and July, 2010, Kim made over 100 calls lasting over 40 hours between 7:00 a.m. and 5:00 p.m. each day to Al-Anon. (T.76, 77, 79). Kim made a total of 140 calls to Al-Anon totaling 53 hours since April, 2010 (Ex. 11). Her paramour, Haley, is an alcoholic (T.77). Haley's wife got a divorce from him on the grounds of adultery in 2009 and got custody of their three children (Ex.7).

Kim admitted that she was seen coming out of a motel on May 16, 2010 near Birmingham with Haley (T.80). She went to Vegas in 2009 and to Nashville in 2009 and 2010 and took a beach trip to Destin in May, 2009 (T.81) She goes to the gym four times a week (T.82). Her preparation for the marathon required running 10 miles which takes 3 hours (T.84). Jarrad was not with her and neither was Conner on any of these trips (T.85) Kim claims she met Haley in 2008 through business. She also testified that she withdrew \$9,184.95 from the bank that belonged to them and Conner on June 7, 2010 (T.90). Kim told Lisa Hall, her next door neighbor, that she was in love with Haley (T.92). Kim admitted that Haley has been to her home (T.92). Kim testified Haley's photo was on Facebook (T.89)(Ex. 5).

Kim testified under oath that Shelly Boswell told her she saw a man rolling a motorcycle out of Kim's garage around 11:00 p.m. one night and that Kim had told Shelley it was a delivery guy named Justin from Palmtree Productions who was dropping off a CD for her to Fed Ex (E.92). Ann Palmer, owner of Palmtree Productions, was called as a witness by Jarrad. She testified under oath that she had never heard of Kim Collins, had no business with Kim Collins and had no reason for any of her employees to be over at Kim's house at night or anytime (T.130) and that she had never heard of Kim's business (T.131). Austin Haley has a motorcycle (T.93).

Kim testified it would be poor parenting skills if the court found that her boyfriend was rolling a motorcycle out of her garage at 11:00 at night (T.93). The home that Jarrad is living in is the only home Conner has had (T.94). She went with Haley to a motel in Florence, Alabama on May 26, 2010 and a Microtel Inn in Birmingham on May 16, 2010 and

Cullman, Alabama on May 13, 2010 (T. 95-96)

At the September, 2010 hearing, Kim testified that the parties were actively engaged in numerous counseling sessions in 2009 and 2010 while she was still seeing Haley (T.105). Kim saw Haley in Tunica in June/July 2009 (T.105). She testified the last time she talked to Haley was several weeks prior, in August of 2010, on her cell phone. She bought Haley an I-phone in Jackson. She went to Jackson and did not tell her parents she was there (T.109). Haley was down there to meet her there (T.107). Jarrad goes to church on Sunday mornings with Conner (T.106). Jarrad takes Conner to his brother's house in Pontotoc to swim (T.109). Jarrad is Conner's soccer coach (T.110). She testified that she and Jarrad have not taken any trips together in at least eight years (T.111).

Shelly Boswell testified that she is 23 years old and she lived next door to Kim and Jarrad (T. 133). In the Fall of 2009, prior to the separation and while Conner was in the dwelling house and Jarrad was gone, she observed from her next door driveway a man in dark clothing, rolling a motorcycle out of Kim's garage on to the street around 10:30 p.m. He pushed the motorcycle down the driveway, cranked it up about halfway down the street and left. Kim told her the next day that it was a client (T.135). Shelly knew Haley as she had done a commercial for him when she was 19 years old (T. 135). She testified that he came across as a pervert who made inappropriate suggestions to her teenage girl friend (T. 137). Shelly took care of Conner twice a week if needed. Her mother is Lisa Hall (T.137). Shelly stated that Kim seemed to be out of town a lot – at least two times a week (T.138) and she has observed Jarrad with Conner and that he had a good relationship with Conner. Jarrad was home more than Kim. He had regular hours. Kim would leave at irregular hours during

the day or night (T.138). Jarrad took care of the child the most (T.139). Shelly would come home from work and usually come next door to see Conner. When Shelly arrived, Kim would leave and go off somewhere (T.141). Kim would go to the tanning bed or go work out (T.142). Most of the time when Kim was out of town, Conner would not go with her and would stay with Jarrad (T.142).

Lisa Hall testified that she lived next door to Jarrad for nine years (T.145). She has a close relationship with Conner. Shelly Boswell is her daughter. Conner would come to Lisa's house often. She would babysit for the family. Kim told her that she had met this man and that she was in love with him, that he'd taught her a lot and they shared a lot of common interests (T.145). Kim told her that Haley was an alcoholic and that he'd lost his children in a divorce recently. Kim said he was everything she'd ever wanted. Lisa testified that she observed Jarrad with the child and that he had excellent parenting skills and that his job did not interfere with taking care of Conner. Kim was out of town a lot and left at odd hours in the evening. Kim would leave when Jarrad came home. Kim was gone a lot from home during the work week due to business (T.146). Jarrad had no difficulty taking care of the child and he had an excellent relationship with the child. Conner idolized his father. Jarrad and Conner are still living in the only home Conner has known. There is a very strong bond between them (T.147). She has seen Jarrad at football and basketball games with Conner.

Lisa Hall stated that after Kim met Haley, she appeared to be gone more often. Kim said she met Haley in early 2009. In December, 2009, Kim came over to Lisa's house and was very emotional. Kim told her that Haley said he wasn't going to talk to her for 60 days and it was killing her. Kim was very upset (T.149). Since Kim's relationship with Haley

started in 2009, Lisa Hall noticed a difference in Kim's relationship with Conner. She wasn't around him as much as Jarrad was. Lisa Hall didn't believe it was a proper environment for Conner to be around Kim in this adulterous relationship and Haley being an alcoholic. Lisa Hall had worked for the Federal Probation Service for 30 years and she'd seen lots of alcoholics. It changes their whole personality. They have difficulty holding jobs, and are not responsible to their family members (T.152). She testified that Haley changed Kim. She wasn't around Conner and "you're not being a parent when you're not at home" (T.154). Kim was gone at least two weeks out of a month (T.155).

Joe Johnson testified that he is a work partner of Jarrad and is familiar with his schedule. He knows Haley and Haley was the cause for his own divorce. Haley had an affair with his wife in 2003- 2004 (T. 160). Jarrad would bring the child to his farm to fish and have fun. Kim did not come (T.161). Jarrad was rep of the year for two years in 2006 and 2007 (T.164).

Darren Collins is Jarrad's brother. He testified that he took a video of Kim and Haley at the Microtel Inn in Birmingham on May 16, 2010 (T.167, Ex.9) and secured a motel receipt (Ex. 10). Kim and Haley were at the motel together on that Sunday afternoon for at least four hours then she and Haley emerged from the hotel together, walking together arm and arm, and made out in the parking lot for 15-20 minutes and then left (T.167). Conner was with Jarrad at the time. Three days before, Kim was in Cullman, Alabama and Conner was with Jarrad. After Haley came along, she was gone more often (T.170). Kim has no family in this area (T.171). Jarrad went on none of these trips with Kim in Las Vegas in the Summer of 2009 and Nashville in 2010, April 2010 or Destin in 2010 (T.171). Jarrad took

care of Conner during those trips. Jarrad has a great relationship with Conner – a close bond. He has good parenting skills, community support and stability of job ( T.172-173). Darren would see Jarrad and Conner probably twice a week (T.175).

Pat Swink, Jarrad's mother testified that saw Conner and Jarrad every other week (T.180). They would come to her house or she would come to Tupelo. In the last two years she noticed a big change in Kim. She was always gone a lot and left Conner with Jarrad a lot but in the last two years, it increased. Kim just seemed to lose interest in what was at home with Conner and Jarrad (T.180). Jarrad has good parenting skills involving the child. Kim was always kind of laid back. She talked to Kim and Jarrad about that before because she thought that Kim would be just real hands on but she never was (T.181). Where Jarrad lives is the only home Conner has ever known. Kim has no family members living in this area (T.181). Jarrad is capable of taking care of his four-year-old son. He's a loving, caring compassionate man and very compassionate about his son (T.182). Conner was in the emergency room one night until 2:00 or 3:00 a.m. After they went home, Kim got up the next morning and went on her trip (T.186).

Pat Swink stated that Jarrad is very protective (T.189). Jarrad is very loving, and Conner comes first. Jarrad coaches Conner's soccer team and he takes him to basketball and football games (T.189). Jarrad takes Conner to Church, gives him his bath, puts him to bed, gets him dressed in the morning and takes him to school. He's a full-time father. Kim has not been a good mother the last two years as she has put her relationship with another man over her son.

Following the two day trial and after consideration of all the evidence and the

testimony, the Chancellor issued his Memorandum Opinion and Judgment on March 22, 2011 (R.E.13). The Chancellor awarded Jarrad a divorce from Kim on the grounds of adultery and made a property division between the parties. Neither of these issues are appealed by either party. After the chancellor made a thorough review of the facts and the case law, including the Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983) factors, he awarded Jarrad primary physical custody of Conner and awarded the parties joint legal custody (R.E.9). Kim filed a Motion to Reconsider (R.29) which was denied by the Chancellor on September 1, 2011 in a 17 page bench ruling (T.256-273; R.E. 79-88, 89). Kim has appealed the Chancellor's awarding custody of Conner to Jarrad. Pages 256, 260, 262, 264-265, 269, 272-273 are not included in the Appellant's Record Excerpts.

### **SUMMARY OF THE ARGUMENT**

The Chancellor heard two days of testimony and reviewed numerous exhibits. Kim's case consisted of calling Jarrad as an adverse witness and presenting her own testimony. Jarrad presented seven witnesses including himself. The overwhelming testimony is that Kim had an affair with Austin Haley which began in 2008 and was continuing through the trial of this case. Her paramour, Haley, was the cause of two other divorces on the grounds of adultery. Kim and Haley had numerous liaisons in Tunica, Ridgeland, Jackson, Florence, Cullman, Birmingham, Alabama and he also came to her house. Kim and Haley sent 7,161 texts to each other and called each other 499 times totaling 196 hours during their relationship. Haley is an alcoholic and Kim made 140 calls totaling 53 hours to Al-Anon from April to September, 2010. Kim went on numerous trips to Las Vegas, Nashville, and Destin without Conner or Jarrad. Kim admitted that she was in love with Haley. While the

parties were actively engaged in numerous counseling sessions in 2009 and 2010 and she was still seeing Haley, talking to him on the phone to and from these sessions. All of the witnesses except Kim testified that her relationship with Haley changed her relationship with Conner. After Kim met Haley, she was gone more, she wasn't around Jarrad as much and Haley had changed Kim. The clandestine, immoral relationship between Kim and Haley continued up to and through the first hearing in September, 2010. Haley and Kim talked on the phone three times totaling 81.62 minutes the first day of the trial. During the month of September, there were 38 calls for 13 1/2 hours and 1,479 text messages. This adulterous relationship has continued since Conner was two years old. The record is overwhelming that the Chancellor's award of physical custody of Conner to Jarrad is not an abuse of discretion nor was it manifestly wrong or in error and should be affirmed.

#### **ARGUMENT**

#### **THE CHANCELLOR DID NOT ABUSE HIS DISCRETION, NOR WAS HE MANIFESTLY WRONG OR IN ERROR BY AWARDING PHYSICAL CUSTODY OF CONNER TO JARRAD.**

The scope of review in domestic relations matters is limited and the Chancellor's findings will not be disturbed when supported by substantial evidence, unless the chancellor abuses discretion, is manifestly wrong, clearly erroneous or applied the wrong legal standards. In reviewing domestic relations cases of this matter, the Appellate Court is not called upon or permitted to substitute its collective judgment for that of the chancellor. The Appellate Court's conclusion that it might have decided a domestic relations matter differently, standing alone is not a basis to disturb the results. Saliba v. Saliba, 753 So.2d 1095 (Miss. 2000); Sarver v. Sarver, 687 So.2d 749 (Miss. 1997); In Re: E.C.P., 918 So.2d



809 (Miss. App. 2005).

As stated in Reddell v. Reddell, 696 So.2d 287 (Miss. 1997), the Court clearly stated that there is a limited standard of review on appeals from Chancery Court and said:

If substantial credible evidence support a chancellor's decision, it will be affirmed...the Court will not interfere with the findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous or wrong legal standards were applied. At p. 288

All of the Appellant's assignments of error are in essence, factual disputes and no more than a request for a "second bite of the apple," contrary to the controlling case law, stated in Bower v. Bower, 758 So.2d 405 (Miss. 2000):

this Court does not reevaluate the evidence, retest the credibility of witnesses or otherwise act as a second fact-finder...if there is substantial evidence in the record to support the Chancellor's finding of fact, no matter what contrary evidence there may also be, we will uphold the Chancellor. At p. 412

The Court's rationale in Bower, supra, is stated in Howard v. Fulcher, 806 So.2d 328 (Miss. App. 2002):

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 out 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. At p. 332.

In Norman v. Norman, 962 So.2d 718 (Miss. App. 2007), the Court said:

In light of our standard of review in child custody cases, we must give deference to the chancellor's determination regarding the weight and credibility of the evidence... As an Appellate Court, we may not substitute our judgment for the chancellor's but must determine if the chancellor's ruling is supported by the substantial evidence... So long as there is substantial evidence in the record that, if found credible by the chancellor, would provide support for the chancellor's decision, this Court may not intercede simply to substitute our collective opinion for that of the chancellor...At P.721

Accord: Porter v. Porter, 23 So.3d 438 (Miss. 2009) although other judges may have ruled differently, we cannot conclude that the chancellor abused his discretion in so ruling.

In Myers v. Myers, 814 So.2d 833 (Miss. App. 2002) the court, in granting a divorce to the husband on the ground of adultery and awarding primary physical custody of the three children to the father stated:

In the judgment of divorce the chancellor awarded primary physical custody of the three children to Benjamin with both parents retaining joint legal custody. The court based its reasoning on the factors in Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983). The chancellor made no specific determinations regarding which parent was better or more qualified for each of the Albright factors. This Court's job is limited as we may only sit in review of the chancellor's ruling and reverse only where there has been manifest error or an erroneous legal standard applied...

It appears that Chancellor Teel considered the proper factors as he clearly stated such in his opinion. In that opinion, he listed the Albright factors and outlined the facts as they would apply to the requisite factors. The court must provide specific factual findings in order for this Court to verify that each factor was properly considered... It is not necessary for a chancellor to keep a score sheet stating who won. Custody battles are not competitions as children are not pawns within a game. The best interest of the child or children in question is always the polestar consideration in questions of custody...At P.835.

The Chancellor, in his opinion, noted the various witnesses supporting Jarrad's parenting skills:

Shelly Boswell, who baby sat Conner, testified that Jarrad had a good relationship with his son, had more regular hours and took care of Conner more often. Shelly's testimony was supported by Lisa Hall who lived next door to Kim and Jarrad. She was, as was her daughter Shelly, often called upon to baby sit and treated Conner as her own. Mrs. Hall noted that Jarrad continued to live in the same house where Conner was brought up and that Jarrad had a great willingness to parent the child. Mrs. Hall often saw Conner and Jarrad together at football and basketball games. Mrs. Hall also noted that Kim was frequently out of town and when she was, Jarrad kept the child. She noted that Kim was more attentive to Conner prior to meeting Haley, stated differently, there was a lot of difference between Kim's

willingness to provide primary care at different times. (T.263, R.E.83).

The Chancellor found that the testimony of Joe Johnson, Darren Collins and Patricia Swink made about Jarrad's parenting skills was in harmony with the other witnesses concerning Jarrad's involvement with Conner and his parenting skills." (T.264; R.E. 4,5,6; R.15-16). The Chancellor, in rejecting the notion that Jarrad excessively used drugs and alcohol, found this claim appeared "problematic since he was named pharmaceutical salesman of the year, coaches youth soccer and submitted a negative drug test (Ex.7; R.E.6).

The chancellor concluded that the moral fitness of Kim since Haley entered her life in 2008 was troubling. Haley, a recovering alcoholic, had recently been divorced on the grounds of adultery and had been the cause of Joe Johnson's divorce on the grounds of adultery and was Kim's paramour in these divorce proceeding. The record reflected over 4,000 texts were sent by Kim to Haley and that monthly they spent thousands of minutes on the phone with each other (Ex. 11).

In Jones v. Jones, 19 So.3d 775 (Miss. Court of Appeals 2009), the Albright considerations included the wife's excessive use of the internet. In Jones, the Court upheld the Chancellor's application of the Albright child custody factors to award custody to the husband in a divorce found the husband was more morally fit than the former wife and considered the benefits in favor of the husband as a result of the child living with the husband including that the husband would be able to remain in the same house and city where she was reared.

An appellant court will not disturb the findings of facts by Chancellors in domestic cases where they are supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. At P.780.

The Chancellor found Kim's testimony concerning the motorcycle incident in the garage at night and her testimony that she had ended her multiple adulterous relationships with Haley in the Summer of 2010 were lacking in credibility (R.7, R.E.9). The chancellor also noted that Jarrad and his various witnesses showed that Jarrad's care of Conner increased after Kim became involved with Haley. As Mrs. Hall said: "She just wasn't around him as much." (T.260). Stated differently, there was a difference between Kim's willingness to provide primary child care at different times (T.263, R.E.83)

The Chancellor rejected the visitation arrangement of four days with one parent and four days with the other questioning whether it was in the best interest for a 4, 5 or 6 year old child and noted that since Conner is soon to start school, this arrangement would be difficult (P.261, R.E.82). The Chancellor found that neither party has a drug or alcohol problem and rejected the notion that Jarrad had an anger problem. (P. 266, R.E.84).

The chancellor concluded that Kim's attraction to Haley transcended any sort of rational infatuation and continued for a period of two years. The Chancellor further stated:

"Kim's excessive use of the telephone and her reaction to lack of contact with Haley would appear to the court to be somewhat obsessive and immature... that the number of calls struck the court as immature and excessive. Kim admitted to having sex with Haley... Kim's attraction to Haley, in the court's opinion, transcended any sort of rational infatuation and continued for a period of two years... At the time she met Haley, he was a married father of three and a recovering alcoholic. Kim's involvement with Haley included the telephone/text relationship and clandestine meetings. The record reflects over 4,000 text messages sent by Kim to Haley and that monthly they spent thousands of minutes together on the telephone with each other. The court is of the opinion that somewhat different than an isolated one night stand (T.268; R.E.86). I found her explanation of the night time visitor at the home as a delivery man for a video was incredible (P.269).

The Chancellor further found:

While Jarrad is certainly not blameless in this case, his behaviors reveal less of a willingness to jeopardize his marriage or his relationship with his son. The court is of the opinion that Kim's behaviors do. Kim's two-year-long affair and her emphasis on activities that do not reflect an ongoing commitment to the family reveal a questionable set of priorities...

The court would strongly refute the argument that Kim's moral fault has not harmed or negatively impacted Conner. The child has been placed in a position between the two parents who love him. He is being asked to share his time between two homes regardless of his own plans or desires. The financial and emotional support that would be provided by a unified home is being denied to him. The parents' need for adult social companionship will inevitably cause them to seek relationships outside the home. Conner's relationship with his grandparents has been complicated. While divorce may provide some advantages for children, the court has seen few except in cases of abuse, and that's not present in this case (T.271; R.E.88).

In reviewing the stability of the home and stability of parents' employment, the chancellor held:

Following Kim and Jarrad's divorce, Jarrad remained in the family home... Kim moved into an apartment which she is renting on a short term lease. The neighborhood in which Jarrad lives provides an ongoing support network for Conner and for him. Conner continues to attend the same daycare that he was attending prior to the divorce. This program also includes kindergarten. In these uncertain economic times and times of economic instability, it is difficult to determine what employment will be. Jarrad has worked for Schering Plough which was bought by Merck Pharmaceutical. In January, 2010, he took on new responsibilities with Merck which gave him more flexibility and clients which were largely in the Tupelo area. In 2008, Kim left her employment with Regebin to form her own company, Kim Collins Public Relations.... The court is of the opinion that the evidence presented related to that factor provides further support of the court's decision. (T.271-272; R.E.88).

The case, sub judice, is not unlike Woodham v. Woodham, 17 So.3d 153 (Miss. App. 2009) where the husband was granted a divorce on the grounds of adultery and granted custody of the minor child. The wife had on occasion carried on her affair in the presence of the child and left the child with family so that she could spend the night with her

paramour. The court stated:

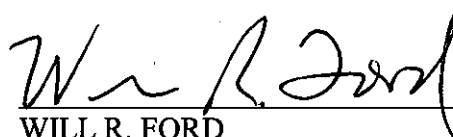
Our supreme court has warned on many occasions that adultery is not to be used as a sanction against a guilty parent in awarding custody of children... The polestar consideration in vesting custody in one parent over the other must be the best interest and welfare of the child. Nevertheless, this does not preclude a chancellor from considering conduct associated with the adultery when it is relevant to one of the Albright factors. Our Supreme Court has on several occasions permitted a chancellor to consider a parent's choice to spend time with a lover rather than her children. See Copeland v. Copeland, 904 So.2d 1066, 1076 (Miss. 2004)... We are satisfied that the chancellor's findings on this issue are supported by this evidence and do not amount to a sanction against Amanda for her adultery...

...Amanda's assertion that joint legal or physical custody would benefit the child is belied by the testimony that the relationship between the parents has been strained by adultery. Furthermore, the supreme court has stated "it is not in the best interest of a small child to be shifted from parent to parent." Case v. Stolphe, 300 So.2d 802, 804 (Miss. 1974)...Rachel will soon begin kindergarten and we have also held that stability of one home is crucial at the beginning stages of a child's education. Daniel v. Daniel, 770 So.2d 562, 567 (Miss. Ct. App. 2000)... At P.159.

### CONCLUSION

For the foregoing reasons, Appellee Robert Jarrad Collins, requests this Court to affirm the Chancellor's findings.

RESPECTFULLY SUBMITTED,

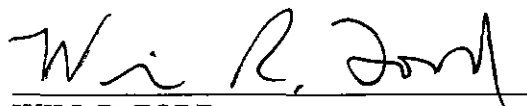


WILL R. FORD  
POST OFFICE BOX 890  
121 EAST BANKHEAD STREET  
NEW ALBANY, MISSISSIPPI 38652  
Telephone: (662) 534-9573  
Facsimile: (662) 534-9574  
MS BAR NO [REDACTED]

COUNSEL FOR APPELLEE

### CERTIFICATE OF SERVICE

I hereby certify that I have this 1<sup>st</sup> day of March, 2012, served true and accurate copies of the foregoing Brief of the Appellee upon Chancellor Michael Malski, Post Office Box 543, Amory, Mississippi; and counsel of record for the Appellant, M. Craig Robertson, Esquire, Post Office Box 2055, Ridgeland, Mississippi 39158 by depositing same in the United States mail, first-class postage prepaid, addressed as indicated.



WILL R. FORD  
POST OFFICE BOX 890  
121 EAST BANKHEAD STREET  
NEW ALBANY, MISSISSIPPI 38652  
Telephone: (662) 534-9573  
Facsimile: (662) 534-9574  
MS BAR NO [REDACTED]

COUNSEL FOR APPELLEE