

IN THE SUPREME COURT OF MISSISSIPPI

KIMBERLY ANNE COLLINS

APPELLANT

VS.

CASE NO. 2011-TS-01307

ROBERT JARRAD COLLINS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(b) of the Mississippi Rules of Appellate Procedure, 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 Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

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2. Robert Jarrad Collins Appellee
3. William R. Ford, Esq., Attorney for the Appellee
4. Kimberly Anne Collins, Appellant
5. M. Craig Robertson, Esq., Attorney for the Appellant
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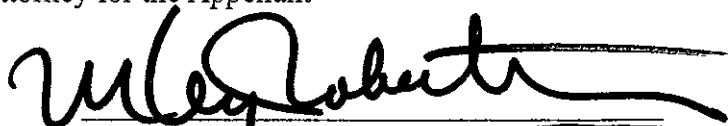

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STATEMENT OF THE ISSUES

1. This Honorable Court should reverse and render sole custody to Appellant because the trial court committed manifest error by incorrectly applying the *Albright* factors by placing undue weight on the moral fitness of the Appellant, or in the alternative, reverse and render joint physical custody to the parties, and for either determination, this Court should remand with instructions regarding the custody and visitation schedule.

STATEMENT OF THE CASE

I. PROCEDURAL POSTURE

This Brief is set forth by the Appellant, Kimberly Anne Collins (“Kim”), after the timely filing of her Notice of Appeal on September 6, 2011 against the Appellee, Robert Jarrad Collins (“Jarrad”). This Brief stems from the March 22, 2011, Memorandum Opinion and Judgment entered by the Chancery Court of Lee County, Mississippi, granting joint legal custody to Kim and Jarrad but primary physical custody solely to Jarrad. (Mem. Op. and J., *Collins v. Collins*, Cause No. 2010-1015-41-MM).¹

II. STATEMENT OF FACTS

Kim and Jarrad were married on June 9, 2001. (Tr. 3; R.E. 20.) On February 26, 2006, the parties were blessed with a son, Robert Connor Collins (“Connor”). (Tr. 54; R.E. 37.) The family lived together in Lee County, Mississippi. (Mem. Op. and J. at 1; R.E. 3.) Kim and Jarrad separated in June 2010, but both continue to live in the same area. (Mem. Op. and J. at 1; R.E. 3.) Subsequently, Kim filed a Complaint for Divorce on June 7, 2010, to which Jarrad filed an Answer and Counter-Complaint. The Chancery Court of Lee County, Mississippi tried this case on September 29, 2010, completed it on December 8, 2010, and entered its judgment on March 22, 2011.

Connor was four years old at the time of trial. (Tr. 54; R.E. 37.) Before Kim and Jarrad’s separation, Kim provided continuous care for Connor on a day-to-day basis. (Tr. 65; R.E. 48.) As their “set routine,” Kim fed him breakfast, dressed him for school by 8:00 a.m., picked him up in the morning at 11:30 a.m., fed him lunch, put him down for naps, played with him and prepared him dinner. (Tr. 60-65; R.E. 43-48.) Kim went to all of Connor’s school parties and took him to church choir on Wednesday nights, where she taught for fifteen years. (Tr. 68; R.E. 50.) She regularly

¹ The grounds for divorce and the division of marital assets were also determined in the Memorandum Opinion and Judgment but are sufficient for both parties and not at issue in Appellant’s Brief.

took Connor to his doctor appointments. (Tr. 25; R.E. 35.) Kim also bought all of Connor's clothes, and for the majority of the marriage, did all of the household laundry. (Tr. 25, 63; R.E. 35, 46.) She maintained the home, handled all the bills, and regularly cooked supper. (Tr. 24, 63, 67; R.E. 35, 46, 49.) Jarrad simply took Connor to school, bathed him on occasion, and only started helping put Connor to bed when marriage trouble began. (Tr. 17, 62; R.E. 31, 45.)

During their marriage, Kim created Kim Collins Public Relations and remains self-employed. (Tr. 55; R.E. 38.) She has a home office, and at the time of trial, she maintained client relationships with the Natchez Trace Parkway, the Ridgeland Tourism Commission and the Southern Public Relations Federation ("SPRF"). (Tr. 56; R.E. 39.) She communicated with these clients through email and teleconferencing, only occasionally making business trips to meet with them. (Tr. 56; R.E. 39.) Even when Kim did travel, her family support system provided assistance. The Natchez Trace begins in Nashville, Tennessee, but her sister, who resides there, is available when needed. (Tr. 57; R.E. 40.) Further, Kim's parents live in Brandon, Mississippi, which is located near Ridgeland, Mississippi. (Tr. 57; R.E. 40.) On several occasions, Kim and Connor would stay with them in order for Kim to work and allow Connor some time with his "pawpaw and mimi." (Tr. 59-60; R.E. 42-43.) Kim also traveled to Baton Rouge for her annual meeting with the SPRF, but always lined up a grandparent or Jarrad to help with Connor. (Tr. 58-59; R.E. 40-41.)

Jarrad is a pharmaceutical sales representative for Merck, Inc. (Tr. 3; R.E. 20.) In Jarrad's own words "every day is different" regarding his work schedule. (Tr. 22; R.E. 33.) Jarrad noted that he would need his brother or other parents from school to help out with Connor in the future. (Tr. 22; R.E. 33.) Jarrad must regularly bring work home and at times, Connor is sat in front of the television set. (Tr. 97; R.E. 64.)

There were times when neither Kim nor Jarrad were able to keep Connor during the week. (Tr. 72; R.E. 53.) When this occurred, Connor would stay with a babysitter, Cici. (Tr. 17; R.E. 31.)

However, Kim expressed her concern to Jarrad in regards to Connor continuing with Cici due to Cici's problems with her ex-husband. (Tr. 21, 73-74; R.E. 32, 54-55.) Outside of business, Kim traveled over a span of two years to Las Vegas, Nevada, for her sister's bachelorette weekend, to Nashville, Tennessee, for a marathon, and to Destin, Florida, for her annual girl's trip. (Tr. 81, 83, 94; R.E. 58, 59, 62.) Jarrad also travels for work, and occasionally goes to sporting events and to Tunica, Mississippi to gamble. (Tr. 6, 64, 203, 239; R.E. 22, 47, 65, 72.)

Kim eventually moved out of the marital bedroom in June 2009, and she and Jarrad began counseling sessions in December 2009. (Tr. 3, 10; R.E. 20, 25.) These counseling sessions began after Kim confessed to Jarrad about her extra-marital relationship with Austin Haley ("Haley.") (Tr. 10; R.E. 25.) Kim was forthcoming about the adulterous relationship throughout the trial proceedings. (Tr. 54; R.E. 37.) For the first time, Jarrad admitted his own adultery after being as a witness. (Tr. 231; R. E. 69.) It is clear that Kim's affair was a symptom of an already diseased marriage.

Kim's friendship with Haley began in March 2009 after working with him on several business projects. (Tr. 54, 234; R.E. 37, 70.) The relationship continued for a year and half and ended in the summer of 2010. (Tr. 54, 88; R.E. 37, 60.) Haley now lives outside Nashville, Tennessee. Although Kim has potential business clients in Tennessee, she remains in Tupelo, Mississippi and stated to the trial court that she has no plans to move to Nashville or marry Haley. (Tr. 234-35; R.E. 70-71.) Moreover, Kim acknowledged the high volume of messages and phone calls between her and Haley. (Tr. 75; R. E. 56.) However, the majority of this communication occurred during Connor's nap hours or in the evening while Connor was asleep. (Tr. 76; R.E. 57.) Some of the communication was also business related. (Tr. 234; R.E. 70.) While Kim recognized out-of-town meetings with Haley, she denied having him as a visitor in her home. (Tr. 93, 96; R.E. 61, 63.)

After their separation, Kim and Jarrad made a mutual agreement to rotate care for Connor every four days. (Tr. 71; R.E. 52.) This informal arrangement mostly worked for them, but during Jarrad's four days, there were several instances where Kim had trouble speaking with her son. (Tr. 28, 71; R.E. 37, 52.) She left numerous text and phone messages with Jarrad, as she was always eager to speak to Connor. (Tr. 28, 71; R.E. 37, 52.) Kim was relegated to often call the daycare to speak to her son. (Tr. 71; R.E. 52.) Even though he was only four-years old, Connor had a much later bedtime with Jarrad, and Kim noticed Connor was very tired after being with his dad. (Tr. 71, 74-75; R.E. 52, 55-56.)

Jarrad is a smoker. (Tr. 17; R.E. 31.) Jarrad admitted to smoking in the car. (Tr. 229; R.E. 67.) Yet, Connor suffered and continues to suffer from respiratory issues and allergies. (Tr. 64; R.E. 47.) Kim testified, "[h]e has to have a breathing machine with him at all times so he can have breathing treatments, if necessary." (Tr. 64; R.E. 47.) In addition to his breathing machine, Connor is prescribed Singulair and Clarinex. (Tr. 65; R.E. 48.) He often suffers from croup attacks, one of which led him to the emergency room. (Tr. 64; R.E. 47.) At the time of trial, Connor had not been diagnosed with asthma due to his age, yet may be "headed that way" in the future. (Tr. 64-65; R.E. 47-48.) Kim took Connor to the doctor most of the time. (Tr. 25; R.E. 35.) A more severe visit occurred when Connor underwent a CAT scan as a baby after doctors found a spot on his brain from an x-ray. (Tr. 62; R.E. 45.) Nevertheless, it was Kim who stayed at the hospital during that frightening time, while Jarrad stayed at work. (Tr. 62; R.E. 45.)

As for the health of Jarrad, he takes daily doses of prescription medication. (Tr. 3-4; R.E. 20-21.) He takes Xanax to fall asleep, Prestique as an anti-depressant, and Singulair for his allergies. (Tr. 3; R.E. 20.) On the other hand, Kim takes no prescription medication and does not smoke. (Tr. 65, 70; R.E. 48, 51.) She takes vitamins and is an avid runner. (Tr. 70; R.E. 51.)

During their marriage, Kim regularly worked out, trained for a marathon, and is in excellent physical and mental health. (Tr. 61; R.E. 44.)

Most importantly, Kim does not use drugs. (Tr. 70; R.E. 51.) Jarrad, on the other hand, smokes marijuana. (Tr. 6-7; R.E. 22-23.) Kim found his drug paraphernalia in their home. (Tr. 7; R.E. 23.) Jarrad also consumed alcohol on a regular basis. (Tr. 13; R.E. 28.) He testified to drinking beer around Connor and other children and even bought liquor for a cookout for which teenagers were present. (Tr. 16; R.E. 30.) Additionally, he testified to consuming alcohol while taking his various mood-altering drugs. (Tr. 13; R.E. 28.) Jarrad cleaned out his liquor cabinet and confessed he needed “to make a change in lifestyle,” but no such change was made and the cabinet was still stocked at the time of trial. (Tr. 13, 228; *see* Ex.12; R.E. 28, 65.) Jarrad’s behavior can also be very aggressive. He admitted to throwing Connor’s egg timer. (Tr. 14; R.E. 29.) Jarrad also testified to shouting at Kim in front of Connor, berating Kim for not wearing her wedding rings, and smashing his hand through a door. (Tr. 8, 11-12; R.E. 24, 26-27.)

Following the presentation of all the evidence and testimony, the trial court committed manifest error by granting Jarrad primary physical custody of Connor. (*See* Mem. Op. and J. at 8; R.E. 10.) Kim and Jarrad were awarded joint legal custody. (Mem. Op. and J. at 8; R.E. 10.) After the judgment, Kim retained new counsel and filed her Motion to Reconsider.²

A hearing on Kim’s Motion to Reconsider commenced on September 1, 2011. First, Kim’s new counsel strongly urged the trial court to reconsider its decision based on the “enormous amount of weight placed on the moral fitness factor in the court’s determination” and alternatively, requested the court to expand Kim’s visitation schedule. (Tr. 250; R.E. 75.) Second, counsel requested that the trial court reopen additional testimony due to the insufficient showing of evidence by her former counsel, who had cancer and passed away after the trial. (Tr. 254; R.E. 78.)

² *See* Motion to Reconsider, Cause No. 2010-1015-41-MM, March 29, 2011.

Alternatively, counsel asked the trial court to grant a joint physical custody arrangement. (Tr. 251; R.E. 76.) Counsel for Jarrad asked the trial court to address *Albright's* employment stability factor, which it had previously failed to discuss. (Tr. 252; R.E. 77.) The trial court addressed this factor, but ultimately denied Kim's Motion to Reconsider.³ (Tr. 271; R. E. 88.)

At the hearing, the trial court provided a restatement of its *Albright* analysis, but specifically focused on the issues for reconsideration. (Tr. 257; R.E. 79.) First, the trial court admitted that it should have mentioned Jarrad's smoking habits as a factor negatively affecting Connor's health. (Tr. 258; R.E. 80.) It stated ". . . the realities are it's not good for your son to have a father who smokes. You are an example to your son. And the realities are, besides the health considerations, he looks to you as an example." (Tr. 259; R.E. 81.) Next the trial court addressed the shared custody agreement Kim and Jarrad maintained before its judgment. The trial court stated "[s]uch a custody arrangement perhaps reveals parents thinking about their own interests rather than the child's interest." (Tr. 261; R.E. 82.) When re-assessing Kim and Jarrad's parenting skills and capacity to provide primary child care, the trial court stated:

Kim clearly wants the responsibility of raising Connor. There is no question about that. And the court did say that there was no **objective proof that her behavior impacted Connor**, although the court would question the future impact of her actions on Connor's life. (Tr. 263; R.E. 83) (emphasis added).

When re-examining the physical and mental health of Kim and Jarrad, the trial court once again pointed out Kim's extramarital behavior. It stated: "Kim's excessive use of the telephone and her reaction to the lack of contact with Haley would appear to the court to be somewhat obsessive and immature." (Tr. 266; R.E. 84.) During its discussion on moral fitness, the trial court found Kim and Jarrad both committed adultery during the marriage, but stated Kim's relationship with Haley "transcended any sort of rational infatuation . . ." and was "somewhat different than an isolated one-night stand." (Tr. 267-68; R.E. 85-86.) The trial court also declared,

³ See Order, Cause No. 2010-1015-41-MM, September 1, 2011.

While Jarrad is certainly not blameless in this case, his behaviors reveal a 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. (Tr. 270; R.E. 87.)

At the end of the hearing, the trial court expressly rejected the argument that Kim's moral fault had not harmed or negatively impacted Connor, but then made the somewhat contradicting statement that "[t]he child has been placed in a position between *two* parents who love him." (Tr. 270; R.E. 87) (emphasis added).

SUMMARY OF THE ARGUMENT

Kim now comes before this Honorable Court and prays that it reverse the trial court's decision. It is obvious that Kim wrongfully received punitive treatment concerning custody, because she had an affair. In child custody cases the polestar consideration is the best interest and welfare of a child. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). When determining this interest, a chancellor uses the following *Albright* guidelines:

1) age, health and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship.

Id.

The trial court discussed these factors when determining Connor's custody not only in its judgment but also during its determination of Kim's Motion to Reconsider. However, the trial court continued to place undue weight on one thing – moral fitness. The trial court colored all aspects of his discussion based upon Kim's extramarital relationship. The learned trial court also seemed to discount Jarrad's own adultery. There was no evidence to suggest that Kim's

relationship with Haley affected Connor in any way, and the trial court did not sufficiently consider Jarrad's one-night-stand, drug abuse, alcohol consumption, gambling habits, and emotional difficulties which require daily medication, and which certainly impacted the dynamic within the Collins' home. It is manifestly wrong that Connor only sees his mother approximately four days per month.

Thus, the trial court erred in awarding primary physical custody to Jarrad, and Kim prays this Honorable Court reverse and render sole custody of Connor to her, or alternatively, reverse and render Kim and Jarrad joint physical custody of Connor. Based on this Honorable Court's decision, Kim requests this Court remand with instructions to the trial court regarding the custody and visitation schedule.

ARGUMENT

I. STANDARD OF REVIEW

Appellate Courts are bound by a limited standard of review in domestic relations matters. *Cuccia v. Cuccia*, No. 2010-CA-00083-COA (Miss. Ct. App. 2011). The Mississippi Supreme Court has held that a chancellor's findings of fact "will generally not be overturned by this Court on appeal unless they are manifestly wrong." *Id.* ¶ 18 (citations omitted.) "However, if a chancellor's decisions are manifestly wrong, unsupported by substantial credible evidence, or based upon the application of an erroneous legal standard the chancellor's findings may be set aside on appeal. *Id.* (citations omitted).

II. THE TRIAL COURT ERRED BY PLACING UNDUE WEIGHT ON KIM'S MORAL FITNESS WHEN DETERMINING CUSTODY WITHOUT CONSIDERING JARRAD'S OWN MORAL FAULT OR EVIDENCE THAT KIM'S BEHAVIOR HAD NO NEGATIVE IMPACT ON CONNOR.

The trial court erred after it placed excessive weight on moral fitness by focusing on Kim's extramarital affair when awarding primary physical custody of Connor to Jarrad. It is well established in Mississippi that "[m]arital fault should **NOT** be used as a sanction in custody

awards. *Albright* at 1005 (emphasis added). Although *Albright*'s analysis of a parent's moral fitness encompasses adultery, it is but *one* factor to be considered. *Carr v. Carr*, 480 So. 2d 1120, 1123 (Miss. 1985) (emphasis added). Mississippi case law establishes that it is often in the best interest of a child to remain with his mother even though she may have been guilty of a marital transgression. See *Cheek v. Ricker*, 431 So. 2d 1139, 1144-45 n. 3 (Miss.1983) (citing *Yates v. Yates*, 284 So.2d 46, 47 (Miss.1973); *Anderson v. Watkins*, 208 So. 2d 573 (Miss.1968); *Schneegass v. Schneegass*, 194 So. 2d 214 (Miss.1966)). Kim prays this esteemed Court would reverse the trial court's decision and grant her primary physical custody, or in the alternative, Kim prays this Court would render joint physical custody to both Kim and Jarrod, remanding this matter with instructions concerning a custody and visitation schedule that promotes Connor's best interest.

More recently, the Mississippi Supreme Court held a chancellor placed too much weight on the moral fitness factor in *Brekeen v. Brekeen*. No. 2002-CA-01136-SCT (¶ 19) (Miss. 2004). The chancellor used the mother's adultery as grounds for divorce and awarded primary legal custody of the minor child to the father. *Id.* ¶ 3. During his *Albright* analysis of moral fitness, the chancellor found the mother's extramarital affair with a co-worker resulted in her leaving the marital home for over a week without contacting her children. *Id.* This "bizarre action" raised serious concern in the mother's ability to serve as the primary custodian of her daughter. *Id.*

The Mississippi Supreme Court found the chancellor had "sanctioned" the wife by denying her custody of her daughter, and the chancellor's decision was "woefully inconsistent" since he stated the wife exhibited "good parenting skills" and "had the capacity to provide for the care of the minor child." *Id.* ¶¶ 18, 20. The Court also found the chancellor had used the eleventh *Albright* factor, "other factors relevant to parent-child relationship," to elaborate on the wife's poor judgment instead of using it to discuss other details not already covered. *Id.* The

Court concluded the chancellor placed too much weight upon the mother's moral fitness during its custody determination and reversed the chancellor's decision. *Id.* ¶ 20.

The facts of *Brekeen* are most analogous to the instant case. Indeed, the trial court sanctioned Kim's marital fault by awarding primary physical custody to Jarrad. The parties themselves had been operating under a joint custody arrangement despite the affair. (Tr. 71; R.E. 52.) Even if this Honorable Court finds that Kim's time with Haley equates to the action revealed in *Brekeen*, it does not outweigh the remaining *Albright* factors. Just as the Mississippi Supreme Court found, the trial court recognized "Kim was a good mother" and "Kim clearly wants the responsibility of raising Connor..." (Mem. Op. and J. at 3-4; R.E. 5-6.) The trial court once again recognized Kim's capacity to provide for Connor at the hearing for Kim's Motion to Reconsider. (Tr. 261; R.E. 82.) As seen in the evidence, it was Kim that fed Connor breakfast, dressed him for school, picked him up in the afternoon, fed him lunch, prepared his supper, bought his clothes, took him to choir practice, and made all of his doctor's appointments. (Tr. 25, 60-63, 68; R.E. 35, 43-44, 50.) She continued this care for Connor even during the parties' voluntarily imposed, rotating schedule after their separation.

After a lengthy discussion of Kim's moral fitness in its opinion and upon a review of the trial transcript, it is easy to determine this factor "took up the lion's share of [the trial court's] attention." *Hollon v. Hollon*, No. 2000-CA-00141-SCT (¶ 23) (Miss. 2001). Unlike its analysis regarding Jarrad's multifaceted bad behavior, the trial court revealed its intolerance for Kim's fault, stating it "transcends irrational infatuation." (Mem. Op. and J. at 5; R.E. 7.) The trial court also highlighted Kim's moral fitness under other *Albright* factors, as the chancellor did when reversed in *Brekeen*. The court's bias again came through in its denial of Kim's Motion to Reconsider. When re-assessing Kim and Jarrad's parenting skills and capacity to provide primary child care, the trial court stated:

Kim clearly wants the responsibility of raising Connor. There is no question about that. And the court did say that there was no objective proof that her behavior impacted Connor, although the court would question the future impact of her actions on Connor's life. (Tr. 263; R.E. 83.)

By stating "the court would question the future impact of her actions on Connor's life," not only was the Court speculating, it was sanctioning Kim for what was obviously thought to be the only factor meriting consideration. When re-examining the physical and mental health of Kim and Jarrad, the trial court once again pointed out Kim's extramarital behavior. It stated: "Kim's excessive use of the telephone and her reaction to the lack of contact with Haley would appear to the court to be somewhat obsessive and immature." (Tr. 266; R.E. 84.)

Even though the trial court took note of Jarrad's own adultery during the marriage, it was again stated that Kim's relationship with Haley "transcended any sort of rational infatuation..." but additionally mentioned that her adulterous behavior was "somewhat different than an isolated one-night stand." (Tr. 267-68; R.E. 85-86.) The trial court harshly and unfairly stated,

While Jarrad is certainly not blameless in this case, his behaviors reveal a 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.* (Tr. 270; R.E. 87) (emphasis added.)

The trial court's declarations are unwarranted and punitive. Kim is highly committed to Connor and his well-being. She never left the home without staying in contact with Connor, and she always made childcare arrangements the few times she did travel. (Tr. 57-60; R.E. 40-43.) As a stay-at-home mom working from home, Kim has no plans on leaving Tupelo. (Tr. 234-35; R.E. 70-71.) Kim was the primary caretaker for Connor on a day-to-day basis prior to her separation from Jarrad and during the rotating four-day arrangement after separation. (Tr. 65, 71; R.E. 48, 52.) Therefore, Kim submits the trial court placed the heaviest weight on only one factor -- Kim's affair when determining child custody. The best interest of Connor dictates that this

Honorable Court reverse and grant Kim sole custody, or in the alternative, grant the parties joint physical custody, giving its instructions to the trial court for the schedule of contact with Connor.

A. The trial court erred by not considering Jarrad's own moral fitness before determining custody.

Throughout its discussion of moral fitness, the trial court did not speak to Jarrad's own moral fault, which admittedly was poorly developed in evidence. Instead, the trial court's focus was placed on the mother's relationship. Without such consideration, the trial court could not properly balance the *Albright's* factors.

Like the Mississippi Supreme Court in *Brekeen*, the Mississippi Court of Appeals similarly found a chancellor erred by improperly placing too much weight on the moral fitness factor in *Fulk v. Fulk*. No. 2001-CA-00923-COA (§ 5) (Miss. Ct. App. 2002). The *Fulk* decision stated "*Albright* dictates that differences in religion, personal values and life styles would not be the sole basis for a custody decision." *Id.* (citing *Albright*, 437 So. 2d at 1005). Furthermore, the court noted that the chancellor declined to acknowledge the husband's own moral shortcomings. *Id.* Therefore, the court reversed and remanded the chancellor's decision. *Id.*

In the case at hand, Kim was completely forward regarding her relationship with Haley to the trial court. She acknowledged it was wrong, but this choice, as examined in *Fulk*, should not be the only source for determining Connor's physical custody. Kim respectfully submits the trial court did not consider Jarrad's own moral fitness, as seen in *Fulk*.

Jarrad committed adultery by participating in a one-night stand during his marriage to Kim, which is an equal or greater showing of poor judgment. (Tr. 231; R.E. 69.) Kim has never used drugs, but Jarrad admitted to smoking marijuana. (Tr. 6-7; R.E. 22-23.) Drug paraphernalia was also found in the home. (Tr. 6-7; R.E. 22-23.) Furthermore, Jarrad admitted that drinking was a regular part of his life. (Tr. 13; R.E. 28.) He exposed Connor to this behavior outside and inside his home. He admitted to drinking alcohol around Connor and keeps a full liquor cabinet in his own

home. (Tr. 228, *see* Ex. 12; R.E. 66.) Jarrad also consumes alcohol under the influence of mood-altering medication. (Tr. 13; R.E. 28.) He is prescribed to take three different types of drugs on a daily basis, two of which are for conditions of his emotional state. (Tr. 3-4; R.E. 20-21.) Finally, Jarrad fully admitted to gambling family money on sporting events. (Tr. 229-230; R.E. 67-68.) These deliberate actions and illegal behaviors should have been evaluated under *Albright's* moral fitness factor.

B. Kim's marital fault has not harmed or negatively affected Connor.

Again in *Hollon*, the Mississippi Supreme Court recognized that in divorce actions "sexual misconduct on the part of the wife is not per se grounds for denial of custody." No. 2000-CA-00141-SCT ¶ 25. The Court explained that at times a party may be granted a divorce on the grounds of adultery, and in the same case custody may be awarded to the other parent. *Id.* Yet, most importantly, the Court noted the trial court never found the mother unfit to care for the minor child and *no evidence was presented regarding any detrimental effects the child may have suffered as a result of living with his mother. Id.* (emphasis added).

The Mississippi Court of Appeals also affirmed a custody grant to a mother who had engaged in an affair in *Brock v. Brock*. No. 2003-CA-01394-COA (2005). Although the extra-marital relationship involved more than 514 hours of the mother being away from her children, the court noted the relationship did not intrude on her role as a mother. *Id.* ¶¶ 36-37. Testimony revealed that the parents continued to take their children to church and lived "productive, responsible lives." *Id.* ¶ 36. Furthermore, the mother "never talked about her affair in front of her children, never engaged in adulterous activity when her children were present, and never allowed the children to meet her lover." *Id.* ¶ 38. The evidence also showed that the mother's extra-marital relationship did not affect her parental responsibilities because she was away from the home about the same amount of time the father was away from the home. *Id.*

In *Smullins v. Smullins*, the chancellor awarded primary physical custody to the father even though he placed equal emphasis on the father's drug and alcohol use and the mother's extramarital relationships. No. 2009-CA-00994-COA (¶15) (Miss. Ct. App. 2011). Citing *Brekeen*, the Mississippi Court of Appeals found there was no evidence of a mother's extramarital affair(s) having any impact on her parenting skills, and instead, pointed out that evidence of the father's routine of drinking alcohol and smoking marijuana needed to be more developed. *Id.* ¶¶ 25, 28. The court stated the "chancellor's findings are contradictory" after acknowledging the father's "problematic" behaviors but choosing to award him custody of the minor child. *Id.* ¶ 27. Therefore, the court found the chancellor's decision in awarding primary physical custody to the father was not supported by the evidence. *Id.* ¶ 28.

In the instant case, Kim submits the trial court overlooked the rule held in *Hollon*. Instead, it heavily weighed one *Albright* factor against the others without fully considering the best interests of Connor. Just as the *Smullins* court found, there is not a trace of evidence that Kim's relationship with Haley had any detrimental effect upon Connor. Similar to *Brock*, Kim texted and called Haley, but never spoke of him in front of Connor. (Tr. 75-76; R.E. 56-57.) She continued to bring Connor to church and Wednesday night choir and she always provided for him exceedingly well during her time with him. She maintained an overall *productive* and *responsible* life with a successful business that continues to grow. Indeed, all the evidence supports that Connor is doing well. While the trial court found Kim's behavior primarily caused the dissolution of the marriage, it pointed out in its opinion that the bond between Kim and her son is strong. (Mem. Op. and J. at 5; R.E. 7.)

However, when re-assessing Kim and Jarrad's parenting skills and capacity to provide primary child care at the Motion to Reconsider hearing, the trial court stated:

Kim clearly wants the responsibility of raising Connor. There is no question about that. And the court did say that there was no objective proof that her behavior impacted Connor, *although the court would question the future impact of her actions on Connor's life*. (Tr. 263; R.E. 83) (emphasis added.)

The trial court clearly stated that there is no evidence that Kim's behavior has negatively impacted her son, but unfairly describes the impact of Kim's actions. As seen in *Hollon, Brock*, and *Smullins*, the chancellor's findings are contradictory.

On the other hand, Jarrad's lifestyle and behavior is "problematic" to Connor as described by the court in *Smullins*. No. 2009-CA-00994-COA (§27). Jarrad admitted that drinking was a regular part of his life. (Tr. 13; R.E. 28.) He even exposed Connor to this behavior outside and inside his home. He admitted to drinking alcohol around Connor and keeps a supplied liquor cabinet. (Tr. 228, *see* Ex. 12; R.E. 66.) Jarrad also consumes alcohol under the influence of mood-altering medication. (Tr. 13; R.E. 28.) He is prescribed to take three different types of medication on a daily basis, two of which are for conditions of his emotional state. (Tr. 3-4; R.E. 20-21.) Jarrad fully admitted to gambling his family money on sporting events. (Tr. 229-230; R.E. 67-68.) Jarrad's behavior is at times very aggressive. He testified to shouting at Kim in front of Connor, berating Kim, smashing his hand through a door and throwing things within the home. (Tr. 8, 11-12, 14; R.E. 24, 26-27, 29.) This behavior appears throughout the trial transcript, but just like in *Smullins* it was not fully developed and the trial court nonetheless made a custody determination.

Additionally, Jarrad's smoking habits are harmful to Connor's health. The trial court recognized the problems associated with Jarrad's smoking habits at the Motion to Reconsider hearing. (Tr. 258; R.E. 80.) It stated "...the realities are it's not good for your son to have a father who smokes. You are an example to your son. And the realities are, besides the health considerations, he looks to you as an example." (Tr. 259; R.E. 81.) The trial court acknowledged

Jarrad smoked outside the home, but it failed once again to note Jarrad's own confession of smoking in the confined spaces of a car with Connor. (Tr. 258; R.E. 80.)

The Mississippi Court of Appeals thoroughly examined the smoking habits of a minor child's parents in *Boaz v. Boaz*. No. 2000-CA-01802-COA (¶¶ 10-12) (2002). The facts revealed the minor child suffered from an asthma-like condition. *Id.* ¶ 10. While he was not of age to be diagnosed with asthma at the time of trial, evidence showed Connor suffers from respiratory issues as well. Certainly, this Honorable Court recognizes the health problems related to smoking and second-hand smoke. Kim is not a smoker, and second-hand smoke will continue to present itself to Connor when living in Jarrad's home.

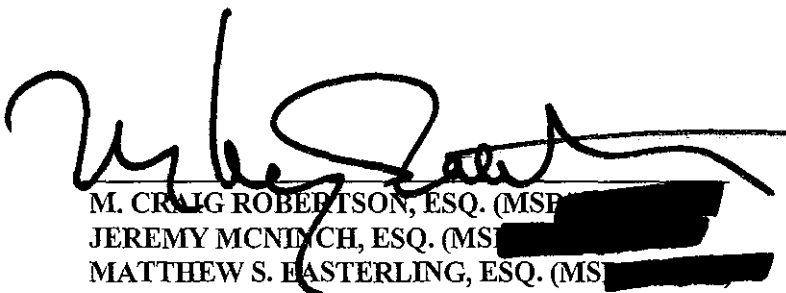
The trial court identified Kim and Jarrad's cooperation in reaching decisions which will affect Connor's welfare by awarding them joint legal custody. Yet, Kim's marital fault - not her capacity as a mother - regrettably influenced the trial court's decision when determining custody more than anything else. It found no evidence that Kim's relationship negatively impacted Connor, but recognized the health concerns Connor may face because of Jarrad's smoking habits. Furthermore, the trial court failed to consider Jarrad's own adultery, questionable lifestyle and unstable behavior before determining child custody of Connor. Therefore, Kim respectfully prays this Honorable Court reverse the trial court's decision and place primary physical custody with Kim, or at a minimum, order joint physical custody to be shared by the parties.

CONCLUSION

Kim submits that the trial court erred in determining primary physical custody of Connor. Kim is a stay-at-home mother that the trial court recognized has the parenting skills and capacity to provide for Connor. The evidence clearly establishes that Kim is a good mother, who had a lapse in judgment, which was a symptom of an already diseased marriage. Jarrad committed

adultery, smoked marijuana, regularly drinks alcohol, has aggressive behavior, gambles, and takes daily mood-altering medication for which the trial court erroneously overlooked in its custody determination and instead, placed undue weight on Kim's moral fitness. The trial court erred in doing so because Kim's behavior had no negative impact on Connor. Therefore, Kim prays for the best interest of Connor that this Honorable Court reverse and render sole custody to Kim, or in the alternative reverse and render joint physical custody to both parties. Kim also requests that in either determination this Honorable Court remand this cause of action back to the trial court with its instructions regarding a more balanced custody and visitation schedule.

Respectfully submitted, the 5th day of December, 2011.



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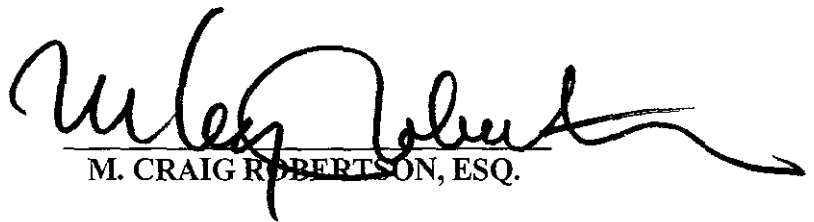
CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the above and foregoing pleading, via First Class U.S. Mail, postage prepaid, to each of the following.

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So certified, this the 5th day of December, 2011.


M. CRAIG ROBERTSON, ESQ.