IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-CP-00828

MICHAEL T. GERTY; and
THE STATE OF MISSISSIPPI *EX REL.*
JIM HOOD, ATTORNEY GENERAL, APPELLANTS

V.

JOESIE R. GERTY APPELLEE

APPEAL FROM THE CHANCERY COURT OF THE FIRST
JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI
Cause NO. 24CH1: 13-cv-2466-2

BRIEF FOR APPELLEE JOESIE R. GERTY

ORAL ARGUMENT NOT REQUESTED

M. CHANNING POWELL
MS BAR NO. 4465
ATTORNEY AT LAW
POST OFFICE BOX 4253
GULFPORT, MS 39502-4253
Telephone (228) 864-5321
Facsimile (228) 863-5748
email: mcplaw@bellsouth.net

ATTORNEY FOR APPELLEE
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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 judges of this Court may evaluate possible disqualifications or recusal.

1. Michael T. Gerty, Pro Se Appellant;
2. Joesie R. Gerty, Appellee;
3. Honorable Jennifer Schloegel, Chancellor, 8th Chancery Court District of Mississippi
4. Justin L. Matheny and the Office of the Mississippi Attorney General, counsel for Appellant the State of Mississippi *ex rel.* Jim Hood, Attorney General;
5. M. Channing Powell, Attorney for Appellee;
6. Thomas W. Teel, Anna Ward Sukmann, and the Perry, Murr, Teel & Koenenn law firm, former counsel for Michael T. Gerty;
7. Brandon Jones, Attorney for AMICUS CURIAE

RESPECTFULLY SUBMITTED, this 30th day of March, 2018.

s/M. Channing Powell
M. CHANNING POWELL
Attorney for Appellee,
JOESIE R. GERTY

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STATEMENT OF ASSIGNMENT

Because this matter involves a constitutional issue and because it involves issues of first impression, the Supreme Court should retain this appeal. This appeal meets Rule 16 criteria.

STATEMENT OF THE CASE

Appellee Joesie R. Gerty[1] does not necessarily disagree the Statement of the Case of Appellant Michael T. Gerty[2]. The one issue that Joesie will point to the Court is that Michael failed to tell the Court that his divorce complaint was denied. Michael inserted the Order of the Court, but failed to put the paragraph in where the Court denied his Divorce.

STATE OF THE FACTS

Michael and Joesie were married each to the other on May 7, 2005, and separated in September 2013, in Harrison County, Mississippi. [R. 321, 324; Joesie R. E. 91, 92][3]. Michael had been in the military about eight and one half years at about the time he married Joesie. [R. 700]. The parties have one child, a male, Jayden Thomas Gerty[4], born December 1, 2009. [R. 257]. Michael had two deployments after the minor child was born. Michael's last deployment was to Guam

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[1] Appellee Joesie R. Gerty hereafter will be referred to as Joesie.

[2] Appellant Michael T. Gerty hereafter will be referred to as Michael.

[3] This brief cites to the record (clerks papers) in the 983-page record on Appeal using this format: [R. (pg #)]. Cites to record pages included in Joesie's record excerpts use this parallel citation format [R.(pg #); Joesie R.E.(excerpt #)].

[4] Jayden Thomas Gerty will hereafter will be referred to as "Jayden".

and he returned in January 2013. [R. 268, 913]. After Michael returned from his deployment in Guam in January 2013, the parties moved into separate bedrooms and lived that way until such time as they separated in September 2013. [R. 295]. The parties continued to have sex during the time prior to them separating [R. 447, 713, 714; Joesie R.E.93-95]. In or about August 2013, Michael discovered that Joesie had committed adultery with Kyle Rebstock. [R. 714, 887; Joesie R.E. 96, 97]. Michael told Josie that Jayden was definitely coming with him. [R. 713; Josie R.E. 94]. Thereafter, Michael drafted irreconcilable differences divorce documents and the parties signed them [R. 441,713,714; Joesie R.E. 99-100]. The adultery ended in January 2014. [R. 618, 619, 879, 880, 909; Joesie R.E. 101-105].

Michael left for the Great Lakes, Illinois, area in late September 2013, and took Jayden with him. Joesie stayed with her friend, Marion Haffner, after the parties separated and Michael moved to the Great Lakes area and before she moved into the Pass Christian house. [R. 882.] Michael helped Joesie store her stuff at Kyle Rebstock's mother's home, where she rented a room for storage. [R. 882, 883; Joesie R.E. 106, 107].

Even after Michael knew about Joesie's adultery, he and she continued to have sex. They had sex every time they met with one another, which was several times afterwards. [R. 811]. Joesie was forgiven of the adultery and the parties worked on reconciliation and got together many times. [R. 281, 282, 283, 287, 324, 325, 328, 611, 714, 717, 811; Joesie R.E. 108,118].

Joesie did not go to the Great Lakes area with Michael because the Gulfport area was her home and she had been in the Gulfport area since she came from the Philippines. Joesie also has two daughters who live in the Gulfport area. [R. 509, 886, 901]. Joesie let Michael take their son, Jayden, with him when he went to the Great Lakes area. Michael had been on two deployments and had missed time with his child, so Joesie wanted to make sure Michael had time with Jayden. [R. 324, 326, 510, 568, 887, 913; Joesie R.E. 171-176]. Joesie did not believe that the divorce was going to go through after they filed the Irreconcilable Differences Divorce. [R. 887; Joesie R.E. 175]. The parties had attempted to reconcile on numerous occasions [R. 519, 587, 608, 870, 890, 891; Joesie R.E. 131-136]. Joesie bought wedding rings for she and Michael and they wore them during their trip to California in December 2014. Joesie believed that the parties were going to reconcile. She believed it so much that she got a transfer from the NEX at Gulfport to the NEX at Great Lakes. Additionally she had begun to box her belongings to move to the Great Lakes area in December 2014. [R. 371, 372, 723, 871, 872, 874; Joesie R.E.119-124]. Michael discussed the parties reconciling and he thought that the marriage might be saved. [R. 717, Joesie R.E.117]. Michael's testimony was that the parties tried to reconcile on numerous occasions. In fact they had sex every time that they got together. [R. 281, 282, 283, 287, 324, 328, 611, 714, 717; Joesie R.E.108-112, 114-117]. Michael told Joesie in January 2015, that it was over and to finish the divorce. [R. 796, 797; Joesie R.E. 125, 126] Joesie had thought the parties would reconcile. [R. 325, 887; Joesie R.E.113, 97]. Joesie says the reason they did not reconcile was not because of Kyle, it was

because Michael told her it was not a good idea. [R. 590, 612; Joesie R.E. 127, 128]. Michael said the reason that they finally did not reconcile was due to the sex that they had in December 2014. [R. 817, 821; Joesie R.E. 129,130]. It was at that point when Michael told Joesie they were not going to reconcile, that she realized it was over and decided to go for custody of her child. Having believed that she would never lose her child to begin with, Joesie knew she had to do something about getting custody of her child. That is when Joesie filed her Withdrawal of Consent to Divorce on Irreconcilable Differences, [R. 29-32] and filed her Complaint for Divorce. [R. 33-40]. Joesie requested custody and at the Temporary Hearing she was granted custody. At trial, Joesie was awarded the physical custody of Jayden. [R. 192, 195; Joesie R.E. 58, 61]

SUMMARY OF ARGUMENT

Michael disagrees with the Court making a determination in regards to custody. This is a contested case and the Lower Court was correct in making a custody determination.

The Court made a custody determination in favor of Joesie Gerty. The Court utilized the Albright factors and made a determination in regards to custody. The Court analyzed all the Albright factors that were applicable to this case.

Michael believes that the Court should have granted him a Divorce on uncondoned Adultery. The facts are clear that Michael condoned the adultery of Joesie and that he discussed reconciliation with her numerous times. The last attempt at reconciliation was in December 2014, and plans were made for Joesie to move to

the Great Lakes area. It was after that family vacation, that Michael moved in with two women and he canceled the reconciliation. His testimony was it was the sex during the December vacation that caused the reconciliation to fail.

As to the constitutional issue in this case, Joesie takes no stand because she did not appeal. However, there was a discussion in regards to harmless errors committed by the Court. The Court should affirm this case in regards to the divorce on irreconcilable differences, since any error made by the Court was technical and harmless.

Michael has trouble with the Court dividing his military retirement. His military retirement was left out of the Property Settlement Agreement and there was no discussion about it when the Property Settlement was made. Therefore, the Court was correct in dividing Michael's military retirement, a marital asset. Additionally, in the Property Settlement Agreement, the parties gave the Court the power to make a decision regarding their property. The starting date for alimony was correct.

The Lower Court made its decision in regards to visitation. The Court applied the correct legal standard and granted visitation to the non-custodial parent. Because Michael did not get the visitation that he desires, does not mean the Court was incorrect.

The Court was correct in its decision regarding divorce on irreconcilable difference, custody, military retirement, any other property discussed by the Court and the visitation.

ARGUMENT

STANDARD OF REVIEW

The familiar manifest error/erroneous legal standard rule applies in this domestic relations case.

> The findings of a chancellor in domestic relations matters will not be disturbed by this Court unless the chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Montgomery v. Montgomery,* 759 So.2d 1238 (Miss.2000). For questions of law, the standard of review is de novo. *Duncan v. Duncan,* 774 So.2d 418, 419 (Miss.2000) (citation omitted).

Irby v. Irby ex rel Marshall, 7 So. 3d 223, 227-28 (¶ 9) (Miss. 2009).

I. THE CHANCELLOR WAS CORRECT THAT THE BEST INTEREST OF THE MINOR CHILD REQUIRED A CUSTODY DETERMINATION.

The Court was correct and applied the correct legal standard when it made a custody determination in this divorce case.

Michael contends the Court did not complete a full *Albright* analysis in either the Temporary hearing or in the Final Judgment of Divorce. [See Appellant's Brief page 11]. The Court did consider the *Albright* factors at the Temporary hearing. In fact, the Court urged the parties to resolve their issues without putting on *Albright* evidence for temporary custody. The Court informed the parties they were going to be held to the adjudication at the temporary hearing unless other matters were presented to the Court that were different than the matters presented at the temporary hearing. [R. 399] The Lower Court did discuss the *Albright* factors in her ruling at the temporary hearing. In fact, the Court made its findings. [R.399-406; Joesie R.E.

83-90]. The Temporary Order in this case had the findings of the *Albright* factors in the Order. [R. 58-66; Joesie R.E. 74, 82].

The Court heard testimony regarding the *Albright* Factors at the trial in this matter. In its final Judgment of Divorce, the lower Court made an exhaustive finding of facts in its *Albright* analysis at pages 46 through 50 of its Final Judgment of Divorce. [R. 188-192; Joesie R.E. 54-58]. The *Albright* analysis and custody matters will be discussed at Argument II of this brief.

Michael finds fault with the Court saying at the temporary hearing that it was in the best interest of the Mother that she have custody of the minor child. [See Appellant's Brief page 11]. Although the Court or the Court Reporter did misstate and say best interest of Mother, certainly the learned Chancellor meant that it was in the best interest of the child. She discussed the polestar consideration is the best interest of the child in the Final Judgment of Divorce. Everyone at the temporary hearing knew the Lower Court meant it was in the best interests of the child that the mother have custody. There was no objection from Michael's attorney. There had been an *Albright* analysis conducted and the Court was determining the best interest of the child. In fact the Court stated so. [R. 188].

Michael has problems with the Court deciding the custody of the child in a contested divorce. Once Joesie filed her Withdrawal of Consent to Divorce on Irreconcilable Differences and filed her Complaint for Divorce, the provisions regarding the child as to custody, visitation, and support were then in the province of the Court. Custody, support, and visitation issues are always in the province of the

Court, even with the parties making an agreement in irreconcilable difference divorce. *White v. Thompson,* 822 So. 2d 1125 (Miss. Ct. App 2002).

Michael takes issue with the Court making a custody determination in this cause. The parties had entered into a Separation and Child Custody and Property Settlement Agreement in September 2013. The matter came before the Court in July 2015, almost two years after the agreement. During that period of time things had changed, and because it was a contested matter; the Court made its custody decision. The Court is always going to look after the best interests of the child and make that as its polestar consideration in custody matters. *Albright* v *Albright*, 437 So.2d 1003 (Miss. 1983).

Michael and Joesie made an Agreement regarding custody, visitation, and support. Michael now believes that the Court could not make a decision regarding custody, but had to go by the decision that he and Joesie made previously. Michael is the one who drafted the Agreement. [R. 441, 713, 714; Joesie R.E. 98-100]. Just because the parties abided by the Agreement for almost two years does not mean that the Agreement had been ratified and the Court was prevented from making a custody decision.

> . . . .The facts showed that the custody agreement entered into between Thompson and White regarding Alex Thompson was merely notional; it was never endorsed by a court of law, and thus did not have binding legal force. The chancellor below recognized this fact, and determined that although Thompson and White had acted as if this were a binding agreement, the agreement by itself was not a custody order. Consequently, this case is the initial primary custody determination. At such a hearing, the

> consideration of the *Albright* factors is a necessity. *Albright,* 437 So.2d at 1005.

White, 822 So. 2d at 1128 (¶ 8).

Michael takes exception to the authority cited by the Court for making its custody determination. The Court properly explained why it was making an *Albright* analysis in regard to custody of the parties' minor child. That analysis and explanation is contained at pages 4 and 5 of the Final Judgment. [R.146, 147: Joesie R.E. 12, 13]. Michael would have this Court subordinate its judgment to Michael's judgment regarding custody. Michael's judgment is contained in an Agreement that was never ratified by any Court, that had never been made part of any Judgment of Divorce and which terms were certainly contested in the Lower Court. Michael would say that his contract and his judgment outweighs the judgment of the Court; the very Court that is charged with determining the best interest of his minor child. No Court had ever determined that the agreement made between Michael and Joesie was adequate and sufficient regarding the custody of their minor child, the child support to be paid, and the visitation for the non-custodial parent. Further, no Court had ever determined that the property issues contained in the agreement drafted by Michael were adequate and sufficient. More will be said about that in other Arguments in Appellee's Brief.

The parties cannot contract away the Court's jurisdiction to provide for the best interests of the child.

> The fact that a separation agreement, incorporated in a divorce decree, has disposed of the children's custody is immaterial, since this is a matter on which the parties

> cannot finally contract, the court having jurisdiction regardless of the agreement.

Tighe v. Moore, 151 So. 2d 910, 917 (1963).

Michael has failed to understand that unless and until the child custody agreement is approved by the chancellor it does not have force of law. *Grier v. Grier*, 616 So. 2d 337, 339-40 (1993).

> For instance, in *McCleave v. McCleave,* 491 So.2d 522 (Miss.1986), this Court upheld a chancellor's refusal to incorporate a prior custody agreement into a subsequent divorce decree. In *McCleave,* the parties entered into a child custody agreement in connection with their pending action for divorce on the grounds of irreconcilable differences. A few days later, Mr. McCleave learned that he had cause to pursue a divorce on other grounds. After a hearing, the chancellor granted the divorce on other grounds and awarded custody of the child to Mr. McCleave, notwithstanding the previous agreement between the parties to the contrary.

Grier, 616 So. 2d at 340 (1993).

This Court has ruled against child custody agreements, being part of a divorce judgment, that try to contract away the power of the Court to address the best interest of the child. This Court held the rules regarding contracts change when children are involved.

> The law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake, or overreaching. *First Nat'l Bank of Vicksburg v. Caruthers,* 443 So.2d 861, 864 (Miss.1983); *Weatherford v. Martin,* 418 So.2d 777, 778 (Miss.1982).
>
> ....

> When the subject of the Agreement is the custody of minor children, even the minor children of the parties, other considerations override the basic rule. *Pace v. Owens,* 511 So.2d 489, 490 (Miss.1987); *Duran v. Weaver,* 495 So.2d 1355, 1357 (Miss.1986); *Tucker v. Tucker,* 453 So.2d 1294, 1297 (Miss.1984). The welfare of the children and their best interest is the primary objective of the law, and the courts must not accord to contractual arrangements such importance as to turn the inquiry away from that goal. *Pace,* 511 So.2d at 490;*Albright v. Albright,* 437 So.2d 1003, 1005 (Miss.1983).

McManus v. Howard, 569 So.2d 1213, 1215-16 (1990).

> Being given jurisdiction by Miss.Code Ann. 93-5-24(6) (Supp.1990) and the children being wards of the state, *Tighe v. Moore,* 246 Miss. 649, 666, 151 So.2d 910, 917 (1963) and there being an ample body of the case law for the guidance of the court, *Arnold v. Conwill,* 562 So.2d 97, 99 (Miss.1990); *Rutledge v. Rutledge,* 487 So.2d 218, 219 (Miss.1986), the court simply cannot surrender or subordinate its jurisdiction and authority as to the circumstances and conditions which will cause a change in custody.

McManus, 569 So. 2d at 1216.

> A child of divorcing parents is a ward of the court. As such, the chancery court is charged with the duty to determine what would be in the best interest of that child and to protect that interest.

McKee v. Flynt, 630 So.2d 44, 50 (1993).

There was discussion as to why Joesie made the custody agreement that she did. She wanted Michael to have time with the minor child because he had missed time on deployments. Further, Joesie believed that the parties were going to reconcile and this custody agreement would never had divested her of custody of her child. [R.

519, 587, 608, 870, 890, 891; Joesie R.E. 131-136]. In this divorce there was contested child custody.

Michael believes that the Chancery Court in reviewing the Separation and Child Custody and Property Settlement Agreement should be held to the same standard that the Supreme Court holds itself to when reviewing Chancery Court decisions. Michael stated:

> "The Appellate Court and the Supreme Court of Mississippi acknowledge that they may not always agree with a chancellor's decision but will overturn a chancellor's decision "only when the decision of the trial court was manifestly wrong, clearly erroneous, or an erroneous legal standard was employed." *Brewer v Brewer*, 191 S.2d 134, 139 (Miss. Ct. App. 2005); *Yates v. Yates*, 284 So. 2d 46 (Mss. 1973) **The Chancery Court should be held to the same standard.** The Chancery Court should modify a child custody agreement drafted by the child's natural parents if it is manifestly wrong, clearly erroneous, or in which an erroneous legal standard was employed. Mississippi code states that the agreement must be "adequate and sufficient," it does not say that the opinion of the Court would have been identical to the agreement. Miss Code § 93-5-2 (2013) To completely reverse a child custody agreement, after the parties had agreed upon the best interest of the child and had been abiding by the agreement for two years with no material change in circumstances, erroneously assumes that the Court is in a better position than the child's natural parents to determine the best interest of the child." (emphasis added)
> Michael's Brief at page 16-17.

The Chancery Court did review the Separation and Child Custody and Property Settlement Agreement, did review all of the custody matters, and hear the testimony

of the parties, review the documents presented in evidence, and weighed the credibility of the parties when it made the custody determination. The Court found that its duty required a custody determination and made it. Michael's Argument I is without merit.

II. THE EVIDENCE PRODUCED AT TRIAL SUPPORTED THE CHANCELLOR'S FINDINGS OF THE ALBRIGHT FACTORS.

In a child custody determination, the Chancellor's decision will stand unless it is shown that the Chancellor was fully wrong, committed manifest error or applied the wrong legal standard.

> ¶ 24. "A chancellor's custody decision will be reversed only if it was manifestly wrong or clearly erroneous, or if the chancellor applied an erroneous legal standard." *Smith v. Smith*, 97 So.3d 43, 46 (¶ 7) (Miss. 2012). "[T]his Court cannot reweigh the evidence and must defer to the chancellor's findings of the facts, so long as they are supported by substantial evidence." *Hall v. Hall*, 134 So.3d 822, 828 (¶ 21) (Miss. Ct. App. 2014). Thus, on appeal in a child custody case, the issue is not whether this Court "agrees with the chancellor's ruling," but only whether "the chancellor's ruling is supported by credible evidence." *Hammers v. Hammers*, 890 So.2d 944, 950 (¶ 14) (Miss. Ct. App. 2004).

Vassar v. Vassar, 228 So. 3d 367, 374-75 (¶ 24) (Miss. Ct. App. 2017).

It is clear that the Chancellor applied the credible evidence and facts of the case to the factors as set forth in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) in making an analysis to determine the best interesst of the minor child. The Chancellor's decision in this case was supported by substantial evidence in the record

and her findings of fact and analysis of the *Albright* factors in her conclusions of law clearly support her decision.

The Chancellor decided that it was in Jayden's best interest that Joesie be awarded the physical care, custody and control of Jayden. In custody decisions the Court is required to analyze the facts through the *Albright* factors to determine the best interest of the minor child. Always remembering that the Polestar consideration is the best interest of the minor child.

> ¶ 25. "[T]he polestar consideration in child custody cases is the best interest and welfare of the child." *Albright*, 437 So.2d at 1005. In evaluating the child's best interest, the chancellor must consider the following factors: (1) age, health, and sex of the child; (2) which parent had "continuity of care prior to the separation" *375 ; (3) "which has the best parenting skills"; (4) which has "the willingness and capacity to provide primary child care"; (5) both parents' employment responsibilities; (6) "physical and mental health and age of the parents"; (7) "emotional ties of parent and child"; (8) "moral fitness of the parents"; (9) the "home, school and community records of the child"; (10) the child's preference, if the child is at least twelve years old; (11) the stability of the home environment and employment of each parent; and (12) any "other factors relevant to the parent-child relationship" or the child's best interest. *Id.*
>
> ¶ 26. The chancellor must address each *Albright* factor that is applicable to the case. *See Powell v. Ayars*, 792 So.2d 240, 244 (¶ 10) (Miss. 2001). However, the chancellor need not decide that each factor favors one parent or the other. *See Weeks v. Weeks*, 989 So.2d 408, 411 (¶ 12) (Miss. Ct. App. 2008). Nor does *Albright* require that "custody must be awarded to the parent who 'wins' the most factors." *Blakely v. Blakely*, 88 So.3d 798, 803 (¶ 17) (Miss. Ct. App. 2012). The point of *Albright* is to identify the custody arrangement that would be in *the child's* best interest—not to determine what is in either parent's best interest or which parent is the better person.

> ¶ 27. The *Albright* factors are intended to ensure that the chancellor follows a process that leads to consideration of all facts that are relevant to the child's best interest. "All the factors are important, but the chancellor has the ultimate discretion to weigh the evidence the way he sees fit." *Johnson v. Gray*, 859 So.2d 1006, 1013–14 (¶ 36) (Miss. 2003).

Vassar, 228 So. 3d at 374-75 (¶¶ 25-27) (Miss. Ct. App. 2017).

In the Judgment, the Chancellor stated that the polestar consideration in child custody cases is the best interests of the child and cited *Albright*. The Court then addressed each of the *Albright* factors as they related to the instant case. The following is how the Lower Court analyzed the *Albright* factors:

1. Age, Health and Gender of the child: The Chancellor found that Jayden was a seven year old boy at the time of trial. Jayden had experienced some behavioral problems which seemed to be resolved at the time of trial. Both parties were concerned about an ADHD diagnosis by Keesler Air Force Base. The Court, after looking at all the evidence, determined that this factor weighed in favor of both parents. There was plenty of evidence regarding how the parents cared for the child. That evidence will be presented as it comes up in the other *Albright* factors.

Michael seems to think that the Court was required to favor him in this factor just because the child is a male. He cited *Flowers v. Flowers,* 90 So. 3d 672 (Miss. Ct. App. 2012); *Mercier v. Mercier,* 717 So. 2d 304 (Miss. 1998) and *Montgomery v. Montgomery*, 20 So. 3d 39 (Miss. Ct. App. 2009) as his authority. Michael said the Court of Appeals and the Mississippi Supreme Court had agreed that the Father should be favored in this factor if all things are neutral. That is not what the Court

said. In *Flowers* the Court never said that. In *Mercier* the Court was discussing the tender years doctrine. In *Montgomery* again the Court was discussing the tender years doctrine. There is no proof and no court case that said that in all cases the sex should favor the parent with the same gender as the child. Michael further states that it would be a greater benefit to Jayden, a male child, to be in the custody of his father. There is no proof of that in the record and there was no proof of any studies presented at trial.

2. Parenting Skills: The Court weighed the evidence and stated that this factor weighs in favor of both parents equally. The Court said the child's problem in school could not be attributed to one parent or the other. Michael finds fault with the Court, in his words for "failing to address the willingness to provide primary care aspect of the *Albright* factors". However, the Court addressed that differently than Michael believed was proper. As has been previously stated, the Court does not have to address all the *Albright* factors, just the ones that are applicable to the case. *Powell v. Ayars*, 790 So. 2d 240, 244 (¶10) (Miss. 2001). Michael details too in his brief multiple times that Joesie was not with Jayden. However, those times that are listed are when Jayden was with Michael in Wisconsin. There was a time when Joesie did go to Gulf Shores and the child was with Michael. The parties were separated according to Michael's testimony. [R. 281; Joesie R.E. 108].

Michael also accuses Joesie of moving in with Kyle's family after he took her out of the base housing at the SeeBee Base. Michael and Joesie lived in base housing at the SeeBee base in Gulfport, Mississippi, until September 2013, when Michael

moved to the Great Lakes area. [R. 439, 440]. When Michael moved out of base housing, Joesie had to move somewhere and Michael helped her move her belongings to Kyle's Mother's house. [R. 442, 888]. The reason Joesie had to stay somewhere was because the Pass Christian house was rented. In January 2014, Joesie moved into the house in Pass Christian. [R. 442, 704]. Joesie did not live with Kyle's Mother, but lived with Marion Haffner. [R. 882, 883; Joesie R.E. 106, 107]. Her only choice was to go with Michael to Wisconsin or to find a place to live in Gulfport.

As stated in the facts, Joesie decided to stay in the Gulfport area. She believed that the divorce would never go through and that she and Michael would be back together. However for the time being, she stayed in Gulfport because her family and her job are in the Gulfport area and this is the only home she has known in the United States. Joesie did not move in with Kyle, or his family. She rented a room to store her belongings at Kyle's mother's home. Michael moved her stuff there so he knows that she stored her stuff there. He has no proof that she stayed at Kyle's mom's home. Joesie's testimony is that she stayed with Marion Haffner. [R. 882, 883; Joesie R.E. 106, 107].

Michael alleges that Joesie was less involved in her parental duties during the adulterous affair. Only one adulterous affair was testified to by Joesie and there is no proof otherwise. [R. 368, 517]. Further, the adulterous relationship with Kyle ended in January 2014. At that time the child was with Michael in Wisconsin.

Michael says that he has demonstrated a willingness to provide care for the child, he details several instances where he made contact with teachers, counselors

and other folks regarding Jayden. One of the things that Michael would have this Court believe is that there are phone records showing phone calls. Those phone records are not in evidence. Simply Michael's testimony that he made 161 phone calls. Further, Michael's testimony shows that he did not talk with Joesie about the child. Michael's testimony is that Joesie is the one who initiates the calls. Michael communicates with the teachers but he does not communicate with Joesie about that communication. Michael is aware that Joesie understood the problems with Jayden and had him in counseling. At the time Michael had visitation with Jayden for Thanksgiving his behavior at school had greatly improved; his teacher was happy with his behavior improving. It was after Jayden came back from his visit with Michael at Thanksgiving that his behavior had deteriorated. Joesie had Jayden in counseling and his behavior had improved. Joesie is cooperative in helping Michael to see Jayden. She did a good job of taking care of Jayden while Michael was on two deployments prior to their separation. [R. 427-431; Joesie R.E. 137-141]. When Michael achieved the rank of Chief, Joesie texted Michael and congratulated him on making chief. His response was appalling. He said some horrible things to Joesie and about her. [R. 435, 436; Joesie R.E. 142, 143].

Michael says he puts top priority on raising Jayden. However at the time of trial, he had not gotten the child's school records nor his medical records [R. 832, 833, 834, 835; Joesie R.E.146-149]. Michael was not truthful with the Court when he said that Jayden had no ear problems when Michael was the primary caretaker in Wisconsin. Michael blamed Joesie for wax build up in the child's ear. [R. 750, 751;

Joesie R.E. 155-156]. Michael sent Joesie a picture showing a wax build up in the child's ear which was later marked as Exhibit 21 in evidence. That was allegedly seven days after he had received the child in November. [R. 605]. However, Michael misled the Court and Jayden's medical records show that on May 14, 2015, the child had complications with an ear infection. [R. 831, 840; Joesie R.E. 145, 154]. Michael was shown the minor child's medical records, Exhibit 27, which show there was no problem with his ears on September 16, 2015, and also show that Jayden's ears were clear on November 3, 2015. In spite of the fact that the records show there was no fluid in the middle ear and no bulging in the tempanic membrane and the ear canal was normal, Michael still wanted to blame Joesie for wax build up in Jayden's ear. We know that the child had no ear infections when the Doctor looked at the child while with Joesie. Further, the medical records show that the outer ear was examined. [R. 837, 838, 839, 840; Joesie R.E. 151-154]. Michael still wants to say that the Doctors did not look for wax build up in the ear. It is incongruent with the medical profession that they could see inside the ear when there was a wax build up as shown in Exhibit 21. Michael testified that it looked like it was three to four months of wax build up. [R. 750; Joesie R.E. 155]. Another incident that Michael testified about was lesions on Jayden's body. Michael testified that the lesions were there when he moved up to Wisconsin in 2013. He did not have the medical problem treated until August 27, 2014. Michael did not tell us about those matters. It was not until Jayden's medical records were obtained that this matter came to the attention of the Court. [R. 830, 831; Joesie R.E. 144-145].

Michael claims he submitted phone records to the Court. That is not true. There are no phone records in evidence. Further, Michael's testimony is that he did not talk to Joesie, but instead talked to Jayden about Jayden's well being. Joesie is one who contacted Michael in regards to the well being of Jayden. Had the Court been inclined to discuss the willingness to provide primary care aspect, that matter would have favored Joesie.

Michael would have this Court believe that Jayden displayed model behavior while in Michael's care. Michael discussed the fact that Jayden did have some behavioral problems in school while he was with him. [R. 427].

The Court said that there was no evidence that either parent had bad parenting skills. The Court weighed the factor in favor of both parents equally. The testimony shows that Jayden had behavioral problems after he came back from visiting with his father at Thanksgiving. Further, he had behavioral problems right after he started school in August after being with his father. [R. 625, 626]. Michael makes much about the behavior of Jayden and says that that weighs in his favor. However, his testimony is that his behavior is because of how his parents have been going on with this divorce. [R. 904].

Michael says that Joesie does not discipline the child. The record shows that Joesie disciplines the child and uses the same discipline as Michael. [R. 754, 892, 893]. Michael's criticism of Joesie's discipline of the child is not well founded. As previously stated, it is not Joesie who is exhibiting bad parenting skills, it is Michael. Further, Michael's dishonesty with the Court about how he treated medical conditions

when the child was with him, shows that he cannot be trusted to take care of the child. Michael alleges Joesie is a night clubber, but her testimony shows that Michael made false statements in his brief. [R. 344, 345; Joesie R.E. 161, 162].

3. Parent child bond: The Court stated that the child was bonded to both parents and the parents were equally bonded to the child. The Court found the factor favored neither parent. From all the testimony in this trial, it is easy to understand why the Court found that this factor favored neither parent since all the parties were bonded. Joesie said Jayden was bonded with both parents. [R. 343; Joesie R.E. 160].

4. Moral and religious upbringing: The Court stated that this factor favored Joesie only slightly. The reason the Court gave was that neither party went to Church before they separated and Michael does not take the child to Church presently. Joesie has started taking the child to Church. Michael stated that he did not take Jayden to Church, but he knew that Joesie had mentioned a couple of times that she had taken the child to Church [R. 291, 292; Joesie R.E. 157, 158]. Joesie on the other hand, stated that she attends the Mosaic Church and Jayden likes to go to Church and Sunday school. [R. 343, 344, 345; Joesie R.E. 160-162]. Marion Haffner testified that she knew that Joesie was a good mother, and that she took the child to church. Further, she had seen Face Book posts about Sunday school and taking the child to the Water Park. [R. 313; Joesie R.E. 159].

5. Primary care: After Jayden was born, Joesie took a step down in her employment so she could care for Jayden. [R550]. Further, while Michael was on two deployments after Jayden's birth, Joesie took care of the child. Michael said that

he trusted her with the child and he trusted her to take the child to the Doctor. The Court found that Michael and Joesie had about equal time with the child post separation and prior to the Judgment of the Court. The Court found that the factor favored both parties equally. The testimony at trial showed that both parties had taken care of the child, both pre and post separation.

6. Capacity to provide primary child care and employment responsibilities: Michael claims that the Court muddied the water in this aspect by combining to things together. The *Albright* factors are to help identify the custody arrangement that would be in the child's best interest. *Vassar v. Vassar*, 228 So. 3d 375 (¶ 26) (Miss. Ct. App. 2017). The Court found that Joesie's work schedule provided for her to have a better capacity to provide the primary care for the child. Joesie stated that she changed her work place so that she would be able to take Jayden to school and pick him up. In her prior job, there were times when she would have to work as late as 8:00 p.m.; that is not the case presently. [R. 656]. The Court was correct in that Michael's time in the military prevented him from being able to take care of Jayden. There were times when Michael could not pick up Jayden nor carry him to school. He had to have help from Amy Malatag and Cherry. [R. 417]. Michael also testified that when he was on the push schedule he had to work many hours and there were times at night that he had to be out working. [R. 258, 259]. Michael further testified that he had changed his place of living and was no longer living with the women who would help him take care of the child. [R. 432]. Jayden's primary medical care is at Keesler Air Force Base in Biloxi, Mississippi. Joesie has

done a good job taking Jayden for his Doctor visits and she has done a good job in taking care of Jayden's needs at school. [R. 521, 522, 523, 524, 525, 526; Joesie R.E. 163-168]. The Court was correct that this factor favors Joesie. Michael says that Joesie had said it would be in the best interest that the child be with the father. Joesie never said that. Joesie allowed the child to go with his father because he had missed time with Michael while he was on deployment. [R. 324, 326, 510, 568, 887, 913; Joesie R.E. 169-174]. Marion Haffner testified the reason that Joesie allowed Michael to have Jayden go with him was because he had not seen Jayden while he was on deployment. She confirmed Joesie's story. [R. 510]. Joesie always believed that the parties would get back together. [R. 519, 587, 608, 870, 890, 891; Joesie R.E. 131-136]. In fact, Michael testified to the many times the parties tried to reconcile. [R. 281, 717; Joesie R.E. 108, 117] Michael is completely off base in his allegation that the Court muddied the waters.

7. The physical and mental health and age of the parents: The Court found that Michael is 43 and Joesie is 38 years of age at the time of the Judgment. The Court further found that both parents are in good health. There is nothing in the record to show otherwise. The Court was correct in finding that this factor favors both parties equally.

8. Moral fitness: The Court weighed the facts and the evidence and found that this factor weighed slightly in favor of the father. Michael takes exception with the Court's finding of it being in his favor. Apparently he would have this Court decide that this factor was overwhelmingly in his favor. That he would like for this

factor to be so strong that the Court could not help but to grant him the custody of Jayden. Michael is wrong in his assumptions and in his analysis. There is absolutely no proof in the record that the adultery committed by Joesie had an adverse impact on Jayden. The proof does show that Jayden did know Kyle and may have seen him one time, the fact that Josie committed adultery had no impact on Jayden. [R. 330, 339; Joesie R.E. 175, 176]. That is the total of the proof on whether or not adultery had an impact on Jayden.

The fact that Joesie committed adultery should not be decisive as Michael would have this Court to believe.

> It should further be noted that marital fault should not be used as a sanction in custody awards, nor should differences in religion, personal values and lifestyles be the sole basis for custody decisions.

Hollon v. Hollon, 784 So. 2d 943, 947 (¶ 12) (Miss. 2001).

> . . . .
>
> In divorce actions, as distinguished from proceedings for modification of custody, sexual misconduct on the part of the wife is not per se grounds for denial of custody. A husband may upon proof of his wife's adultery be granted an absolute divorce on that grounds and yet in the same case custody of the children may be awarded to the mother. Our cases well recognize that it may be in the best interest of a child to remain with its mother even though she may have been guilty of adultery.
> *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)).
>
> ¶ 26. This view of custody arrangements is comparable to that employed in other states in similar fact

> situations. *Cheek,* 431 So.2d at 1145 n. 4 (citing *950 *Roberson v. Roberson,* 370 So.2d 1008, 1011 (Ala.Civ.App.1979) ("a mother will not be denied custody for every act of indiscretion or immorality", especially where no detrimental effect on the welfare of the child has been shown); *Rippon v. Rippon,* 64 Ill.App.3d 465, 21 Ill.Dec. 135, 381 N.E.2d 70, 73 (1978) ("indulgence in moral indiscretions alone is not grounds for a change of custody where the children are leading a normal life")).

Hollon, 784 So. 2d at 949-50 (¶¶ 25-26) (Miss. 2001).

It is hard to understand how Michael could say the Court placed no weight in its own determination. The Court was correct in calling Michael's uncorroborated accusations into question. Michael had moved in with two women. He had been living with one of the women and her husband. That woman was getting a divorce. That woman's name is Amy Malatag. He also moved in with Cherry. Michael has a problem with the Court determining that his credibility was called into question. Certainly there was sufficient evidence for the Court to find that there was not a clear explanation to rebut the inference made by the Plaintiff. The parties had been together in December 2014 and having a sexual relationship and the plans were made for Joesie to move to the Great Lakes area to be with Michael. The parties had decided to reconcile. Right after Amy Malatag moved in with Michael, he decided that he wanted to call off the reconciliation. [R. 401; Joesie R.E. 177]. The only explanation Michael really gave for calling off the reconciliation was that the sex was not up to standard in December. [R. 821; R.E. 130]. The Lower Court recognized that Michael changed his mind regarding reconciliation and that "[t]he change in Michael's attitude was most likely due to involvement with another woman rather

than any disgust toward Joesie, real or otherwise". [R. 161; Joesie R.E. 27]. What the Court said was "the only intervening event between those two circumstances was the fact that Defendant moved and began to reside with two other women" [R. 191; Joesie R.E. 57].

Michael continues to find fault with the Lower Court and say the Court was one sided. Michael talks about continuing and undisclosed contacts by Joesie with her paramour. However, at the time Michael moved in with Amy Malatag and decided to call of the reconciliation and the marriage, he did not know about the things that he alleges and discusses in his brief. [See Michael's brief at page 25]. In fact his statement is "in the December trip I did not know all this information." Further, Michael says he did not know about those things when he told her it was over with. [R. 817, 821; Joesie R.E. 129, 130]. The Court heard the testimony and made notes. The Court knew the proof when she wrote her opinion.

The Court found that Michael had moved in with a woman to whom he was not married in with in the Great Lakes area. The Court knew that Michael had moved in with Joesie and was having sex with her when she was still married. [R. 797.] Michael knew that Joesie had a problem getting her children because she was committing adultery. [R. 797, 775]. Joesie did not like Michael living with Amy in the presence of Jayden and she told Michael about it. [R. 375].

Michael wants this Court to believe that his preoccupation with raising Jayden is the reason why he did not press for the divorce. However, Michael stated that he wanted to go ahead and get the divorce, but then decided to reconcile. He attempted

reconciliation many times. At any time after 60 days from September 13, 2013, Michael could have taken the divorce on irreconcilable Differences. Michael testified that he knew he could have, but he did not hire a lawyer to complete the Divorce. Instead he relied on Joesie to obtain the divorce. [R. 796].

Michael says the Court was free with disparaging words regarding his character. One particular thing that the Court found unbelievable was that there was such a drop in the value of the Steeplechase home without evidence to prove the value. Simply Michael's testimony on the matter was not sufficient proof for the Court to believe that there was such a drastic drop in the value of that marital asset. Yes, it is unbelievable. The other matters of which Michael complains have been raised and addressed in this brief on numerous occasions.

Michael want to say that Joesie is not credible. The Court determined that she was credible. The Court was charged with hearing the testimony, reviewing the documents and evidence and determining credibility of the witnesses. She did that after seeing the interaction of the witnesses with the lawyers. "After "smelling the smoke of battle," the chancellor made findings that were supported by substantial evidence." *Bellais v. Bellais*, 931 So. 2d 665, 671 (¶ 31) (Miss. Ct. App. 2006).

Michael finds fault with Joesie's UCCJEA affidavit in her Complaint. In 2013 a Complaint was filed with a UCCJEA affidavit in Harrison County and Joesie followed that in her Complaint in 2015. Joesie explained that she believed that since they were not divorced, that where she stays is Jayden's residence. [R. 887, 888; Joesie R.E. 183, 184]. Michael knows that the State of Mississippi has jurisdiction

over his child. Yet, he tried to chastise Joesie for saying that the residence of the child was in Harrison County, Mississippi. In fact, the documents that were filed for the Irreconcilable Differences Divorce showed that Harrison County, Mississippi, had jurisdiction and that the child was living in the State of Mississippi at the time it was filed. Michael could have hired a lawyer to finish the divorce in Mississippi, but he never did. [R. 792, 793, 794, 795, 796, 887, 888; Joesie R.E.178-184]. The complaint had been filed in 2013, and the Court had already assumed jurisdiction in the case by the filing.

If there are bank statements that show Joesie sent money to the Philippines, those statements are not in evidence. If Joesie sent money to the Philippines it must be remembered that she was working. She sent her money to her family in the Philippines. She did not send any of Michael's money, because he gave her none of his money.

Joesie again and again gave the accurate time line of her relationship with Kyle. [R. 618, 619, 879, 909; Joesie R.E. 101-103, 105]. Michael just will not believe it. Joesie was somewhat confused about Jayden's preschool. The one thing she did know was that Jayden was up in Wisconsin and Michael was not telling her what was going on in Jayden's life. Michael says he presented phone records. There are no phone records in evidence. If there were, Michael would have put the exhibit number in his brief. All of these little immaterial things that Michael raises to try to show that Joesie is incredible, do not show anything except that he dwells on the

immaterial rather than the substantive issues. Additionally, all these things have all been addressed in this brief or will be addressed later.

Michael wants to blame Joesie for not telling him about certain things at school or about the medical problems with Jayden. It is obvious that Michael is one who is untruthful and did not tell Joesie about matters that happened with Jayden while in his care. Michael is the one who, to use his word, lied to the Court about Jayden's ear infection. He said that Jayden did not have an ear infection while in his care. [R.750, 751; Joesie R.E. 155, 156] He presented a photograph to try to show that Joesie was a bad parent by allowing the child to have a build up of wax in his ear. It was not until it was discovered that the child had an ear infection with Michael and the record was presented at trial, that he admitted to it. [R. 831, 840; Joesie R.E. 145, 154]. Further, he was dishonest with the Court when saying that the Doctor would not look for wax in the child's ear. [R. 838,839; Joesie R.E. 152, 153] In looking at Exhibit 21 in evidence, anyone can see that a Doctor could not see the tympanic membrane or the ear drum with that kind of build up of wax. Not only that, but the middle ear could not be inspected and hardly the outer ear could be inspected. Certainly the ear canal was blocked and could not be inspected. Joesie proved with the child's medical records, that the child had no medical problem with his ears when the child was with her. [R.837, 838; Joesie R.E. 151, 152] Michael presented a picture and tried to blame it on Joesie, when in fact, the matter occurred while in his custody. Michael tried to deceive the Court into believing that Joesie was a bad mother in regards to the ear wax in the child's ear. All the while, he was the culprit

and he lied to the Court about it. Michael also uses the term "Team Joesie". Apparently he thinks that the Judge and Joesie are team mates.

Michael wants to criticize the Court for allowing in evidence the testimony of what Jayden told Joesie about Michael and Amy. It is the Judge that is listening to the testimony and observing the witnesses and their demeanor under the pressure of the circumstances and their counsel when making rulings on evidence. The Court made its ruling on the evidence and heard the testimony of the child saying that Michael and Amy are kissing. He even called her Auntie Amy. [R. 541, 921].

Again, the lower Court found that his factor slightly favored Michael. He cannot stretch the evidence so far as to get the result that he would like to have; that this evidence weighs so much against Joesie that he should have custody of the child. That is a stretch the Lower Court was not willing to make and this Court should affirm her decision on custody.

In his brief Michael takes continuity of care prior to separation out of order from the way the Court ruled on the matter. The Court ruled on primary care in paragraph 81 of the Judgment. [R. 189, 190; Joesie R.E. 55, 56]. The Court ruled that it favored both parents. The issues that Michael raises in his Brief on pages 31-33 in regards to continuity of care prior to separation have been previously addressed in this Brief and was addressed by Court.

9. The preference of the child at the age sufficient to express a preference by law: Jayden is not of sufficient age to express a preference regarding his parents.

10. The home, school and community record of child: The Court found that his factor favors Joesie. At the time of the Temporary Hearing Michael was living with two women in the Great Lakes area. [R. 825]. At the time of trial, he had moved out of the home with the two women and was living by himself. [R. 826]. Michael had moved from the house the child knew when he was living with him. Jayden has started school in the Harrison County School District and at the time trial ended in May 2016, he was in kindergarten. Jayden lived in Harrison County all of his life except the brief time he was with his father in the Great Lakes area. The home in Pass Christian is where Jayden's home, school and community record lies. Michael criticizes the Court for saying that there are friends available and family to help Joesie with Jayden. Michael was not penalized for not having people available to help him. The Court simply noted that Michael did not have the help he once had when he was living with Amy and Cherry. Michael wants to blame the Court for his sense of helplessness in not having someone at his home to take care of Jayden when he is not there. Yet, he would criticize Joesie if she had someone at her home to help with the child. Michael characterizes Joesie's close knit Filipino community as going out with her to night clubs. That is not what the evidence showed. In fact Joesie testified that she does not go out to clubbing anymore. [R. 344, 345; Joesie R.E. 161, 162] Further, Michael continues to say that Joesie moved in secretly with Kyle's family. That is not true and has been previously explained. Amy Malatag's testimony shows that she was against Joesie. In fact she made some pretty derogatory statements regarding Joesie and her living with another man instead of her son. That

kind of testimony translates into actions and talking in front of the child that is bad for the child.

Michael says that there is a misdiagnosis of ADHD of the child. The medical records in evidence as Exhibit 27 clearly shows that the child was diagnosed with ADHD. Michael was questioned about the child's ADHD and he recognized there had been a diagnosis. [R. 843]. The parties are to be congratulated for working together to have treatment other than prescription medication for the ADHD. [R. 904, 905].

11. The stability of home environment for each parent: The Court found that this factor favors both parents equally. Michael's reasoning as to why it should favor him has been discussed and the Lower Court addressed it numerous times. The fact is, Joesie is living in the home where the parties had lived previously. Joesie will be able to live in that home as long as she desires. She has stability in her home environment and the child has stability in his home environment. He knows where his home is; he knows were his school is located. Joesie changed her work so that she would be able to meet the needs of the child and meet his time lines. Further, she has changed her work schedule so that she is off on the weekends. This enables her to go to Church with the child. Certainly the Lower Court addressed all of these issues previously and her decision that this factor favors Joesie was well reasoned.

12. The best interests of the child: At the time of trial, as well as the Temporary Hearing, the Court weighed the *Albright* factors and found that it was in the best interest of the child that he remain in the custody of his mother. The Court

granted liberal visitation to the father. Michael went into other factors, but that was just a rehash of why the Court had an *Albright* hearing in the beginning. Further, Michael seems to think that his idea of the weighing of the *Albright* factors is best for the child. The Court weighed the *Albright* factors and found the best interest of the child would be served living in the custody of Joesie.

> The chancellor provided a detailed analysis of his findings for each *Albright* factor and weighed the prospect of each party serving as custodial parent. After "smelling the smoke of battle," the chancellor made findings that were supported by substantial evidence. We may not agree with the chancellor's findings. We may have decided the case differently. However, we were not present to observe the parties, the witnesses or to consider all of the evidence, facts, circumstances, events and happenings of the trial. "[I]t is the chancellor's duty to weigh the evidence, and he is in a better position th[a]n this Court to judge the veracity of witnesses and credibility of evidence. In reviewing the record, this Court finds that the chancellor was more than justified in ruling as he did." *Lee,* 798 So.2d at 1291(¶ 29).

Bellais, 931 So. 2d at 671 (¶ 31).

It is clear the evidence produced at trial supported the Chancellor's Judgment that Jayden should be in the custody of Joesie. A Chancellor is required to consider each of the *Albright* child custody factors when making a child custody decision. *Hamilton v. Hamilton*, 755 So.2d 528 (Miss. App. 1999). Since *Hamilton*, the Supreme Court has had an opportunity to address child custody matters in the context of *Albright*. *Mosley v. Mosley*, 784 So.2d 901 (Miss. 2001). In *Mosley*, the Chancellor considered and applied the *Albright* factors and made comment specifically on each one. *Mosley*, 784 So.2d at 906. In the instant case, the

Chancellor made an extensive Finding of Fact and thereafter set forth each of the *Albright* factors. An examination of the Chancellor's opinion reveals that the *Albright* factors were clearly considered and applied.

It is clear that the Chancellor applied the correct legal standard and made no error in its application, which was supported by the overwhelming weight of the evidence. The Chancellor clearly followed case law and requirements concerning the specific factual findings in reference to the *Albright* factors. The overwhelming weight of the evidence supports the Chancellor's decision to place Jayden in the custody of Joesie. It is in Jayden's best interest to be in the custody of Joesie.

III. THE CHANCELLOR WAS CORRECT IN NOT GRANTING APPELLANT MICHAEL T. GERTY A DIVORCE ON THE GROUND OF ADULTERY.

The Lower Court was correct when it denied Michael's Complaint for Divorce because he had condoned the Adultery of Joesie Gerty.

Michael first found out about Kyle in August 2013, by looking at Kyle's Face book account. [R. 810]. At the time he and Joesie had discussions about the adultery and she told Michael she was sorry for her actions. Afterwards they had sex. In fact, every time Michael and Joesie were together they had sex. [R. 811]. Joesie believed that she had repented and had gotten forgiveness from Michael in regards to the adultery. [R. 514]. At the time that Michael found out about the adultery with Kyle, Joesie told Michael everything he wanted to know about the matter. Michael could have found out all about every detail and picture, had he wanted.[R. 609, 610; Joesie

R.E.185, 186] After that Michael and Joesie had sex many times. [R. 811; Joesie R.E. 118].

Michael said the reason that they finally did not reconcile was due to the sex that they had in December 2014. [R. 817, 821; Joesie R.E.129, 130]. It was not, as he would have this Court believe. The pictures and other items that Michael found and either introduced in evidence or talked about, he did not know about until the time that the divorce proceeding was ongoing. [R. 817, 821; Joesie R.E.129-130].

Both parties testified at trial that Michael knew about adultery by Joesie. Further, the parties continued to have sex and discuss reconciliation. [R. 519, 587, 608, 870, 890, 891; Joesie R.E. 131-136]. There is no doubt that Michael knew about the adulterous relationship that Joesie had with Kyle Rebstock. Kyle was discussed during times that the parties were reconciling. Joesie's testimony is that the sexual relationship with Kyle terminated in January 2014. [R. 618, 619, 879, 880, 909; Joesie R.E. 101-105]. The parties attempted reconciliation and had sex all the way through December 2014. [R. 281, 282, 283, 287, 324, 328, 611, 714, 717, 811 ; Joesie R.E. 108-112, 114-118] It was not until the time that Michael had Amy and Cherry move in with him in January 2015, that he stopped talking about reconciliation with Joesie. It was at that time that he stopped having sexual relationships with Joesie. [R.811; Joesie R.E. 118] Clearly a year prior to that Joesie had terminated the affair with Kyle Rebstock. [R. 618, 619, 879, 880, 909; Joesie R.E. 101-105] Further, all during that period of time and as late as December 2014, Michael and Joesie continued to have sex and talk about reconciliation. [R. 281, 282, 283, 287, 324, 325,

328, 611, 714, 717, 811; Joesie R.E. 108-118] It seems to be impossible that the parties would be discussing reconciliation without discussing Joesie's sexual relationship with Kyle. It is incongruent that Michael would be talking about reconciliation and Joesie coming to live with him and having sex with her and not talk about her prior sexual relationship with Kyle and whether or not it was still ongoing. The parties were going to live together in the Great Lakes areas where Michael was in the military. Joesie was going to move up and had already prepared to transfer her job there with the Navy Exchange. Joesie had already packed some of her property for the move. [R. 371, 372, 723, 871, 872, 874; Joesie R.E. 119-124] Michael knew all about Kyle and when that relationship terminated. Michael by his own testimony states that he condoned Joesie's adultery. [R.717; Joesie R.E.117]. Further, there is no uncondoned adultery by Joesie. Her testimony shows that as well.

Michael was wrong in stating that the adultery is uncondoned. The Court weighed the evidence and the testimony of the parties and had the opportunity to observe the parties and the interaction with the lawyers and was there to "smell the smoke of battle". "After "smelling the smoke of battle," the chancellor made findings that were supported by substantial evidence." *Bellais*, at 671 (¶ 31).

The Chancellor determined that Michael had condoned the adultery of Joesie and that he was not entitled to a divorce on the ground of adultery. The Lower Court was correct when it stated that neither party had proven Habitual Cruel and Inhuman Treatment. The Court did not abuse its discretion and did not err when it found that Michael condoned the adultery committed by Joesie.

IV. ANY ERROR BY THE COURT IN GRANTING A DIVORCE ON IRRECONCILABLE DIFFERENCES WAS HARMLESS ERROR.

Although the Chancellor technically erred by granting a divorce on the ground of irreconcilable differences, this Court should hold that error harmless. Michael has shown no prejudice which would make the error reversible. *Rounsaville v. Rounsaville*, 732 So. 2d 909, 912 (¶ 11) (Miss.1999). There was a technical error because there was no consent to adjudicate by the parties. However, the parties had filed for Irreconcilable Differences Divorce. Joesie filed her Withdrawal of Consent to Divorce, but did plead irreconcilable differences as an alternative in her complaint. Further, Michael wanted the Court to uphold the Property Settlement Agreement and the Court did. Although this is an unusual case, it qualifies to be affirmed under the principles espoused in *Rounsaville*. Further, this Court has held that errors such as occurred here are procedural errors and are harmless under the facts of the case. *Johnson v. Johnson*, 722 So. 2d 453, 457 (¶ 10) (Miss. 1998). Michael has not argued the Constitutional Issue in this case. Further, Michael has not argued that the Court made error when it granted a divorce on irreconcilable differences. He simply says that the Court should have granted him a Divorce on the Ground of Adultery, thereby making the Constitutional issue moot. Joesie says the Court was correct in granting a divorce on irreconcilable differences. This Court should affirm the Lower Court's granting a divorce on irreconcilable differences.

Michael accuses the Court of using this case as a vehicle to further the Chancellor's interest. Michael is now questioning the integrity of the Court. The Court found there was no uncondoned adultery by Joesie and denied Michael a

divorce on the ground of adultery. He would say the Court was wrong, and as a result, the Court's finding that the statute is unconstitutional as it requires consent of the parties to divorce on irreconcilable differences is now moot. That is the sum of Michael's discussion regarding the Lower Court's holding that *West A.M.C.* § 93-5-2 is unconstitutional as it requires consent.

The State, through the Attorney General's Office has adequately briefed whether or not the statute is unconstitutional and whether or not the Court exceeded its authority in granting this divorce on irreconcilable differences. Joesie is satisfied that the Lower Court made the right decisions in the custody and the property issues in this divorce. Joesie is satisfied that she is divorced from Michael. Since Joesie has not appealed the Judgment of Divorce, she takes no stand as to the constitutionality of *West A.M.C.* § 93-5-2.

Joesie disagrees with the Brief of the Amicus Curiae because there was no abuse of the spouse in this case. The Amicus Brief is completely off base and Joesie asks the Court to reject that Brief outright.

V. THE COURT WAS CORRECT TO DIVIDE A SIGNIFICANT MARITAL ASSET EXCLUDED FROM THE PROPERTY SETTLEMENT AGREEMENT.

Michael believes that his military retirement is a community property asset. He discussed that during the course of the trial. [R. 787, 788; Joesie R.E.187, 188].

There is nothing in the record to show or that states that the parties discussed Michael's military retirement when the irreconcilable differences and property settlement documents were drafted. There is no testimony about the parties assuming

the military retirement was future earnings. Michael did testify at trial that he thought his military retirement was community property. [R. 787, 788; Joesie R.E. 187, 188].

The Chancellor was correct by dividing the marital asset, Michael's military retirement. The Chancellor quoted Section 14 of the Agreement and found that the parties relinquished to the Court the authority and power t divide assets and liabilities in Section 14 of their Agreement. . The Chancellor found the Agreement binding and enforced it [R. 181; Joesie R.E. 47]. Michael's military retirement and Joesie's 401K were not listed in the Separation and Child Custody and Property Settlement Agreement. The Court found that the Separation and Child Custody and Property Settlement Agreement would be affirmed as to the property that was listed. The Court then found Joesie was entitled to 22% of Michael's military retirement. This is because the parties had lived together during the time that Michael was in the military. When the Court addressed property that had not been listed in the Separation and Child Custody and Property Settlement Agreement, it found that Joesie was entitled to a portion of that property according to Mississippi Law. *Hemsley v. Hemsley,* 639 So.2d 909, 914 (Miss 1994); *Baker v. Baker*, 807 So.2d 476, 480 (Miss. Ct. App. 2001). The lower Court found that Joesie was entitled to a portion of the military retirement as property. Because Michael's military was not listed in the Separation and Child Custody and Property Settlement Agreement the Court divided that asset. Michael drafted the Separation and Child Custody and Property Settlement Agreement, but failed to address his military retirement. Michael provided no proof, and there was no testimony, that at the time the Separation and

Child Custody and Property Settlement Agreement was negotiated and signed that there was any discussion about Michael's military retirement. In fact, Michael admits in his brief that his military retirement was not discussed by the parties when the Separation and Child Custody and Property Settlement Agreement was drafted. With no proof in the record, Michael states that he and Joesie made certain assumptions regarding the retirements. [Michael's Brief at page 13]. There was absolutely no testimony about assumptions or about retirement when the Separation and Child Custody and Property Settlement was drafted.

The Court found that the Separation and Child Custody and Property Settlement Agreement was not adequate and sufficient in regards to one of the major assets of the parties, Michael's military retirement. *Traub v. Johnson*, 536 So. 2d 25 (Miss. 1988). The Court further found that since it did not set out whether Michael gets it all and Joesie gets none, that the agreement was ambiguous and she resolved the ambiguity. This Court has recognized that Property Settlement Agreements are no different than any other contract. The fact that it is incorporated into a Divorce Decree makes no difference. When the Court uses the three tier approach to contract interpretation and the terms of the contract are found to be ambiguous the contract will be interpreted in a reasonable manner. *In re: Dissolution of Marriage of Wood,* 35 So. 3d 507, 513 (¶ 9) (Miss. 2010). The Chancellor determined that the contract was ambiguous in regards to Michael's military retirement. The Court was well justified in doing so. The Court found as to Michael's military retirement, the

Separation and Child Custody and Property Settlement Agreement was not adequate and sufficient. A substantial asset had been left out of the Agreement.

> However, the principles of equitable distribution apply in all divorce cases, whether based on fault grounds or irreconcilable differences. *Perkins v. Perkins,* 787 So.2d 1256(¶ 24) (Miss.2001). The requirement of Mississippi Code Annotated Section 93-5-2 that the chancellor determine that adequate written provisions have been made for support and property division, must be read in conjunction with the common law directives regarding equitable distribution and alimony.

Ash v. Ash, 877 So. 2d 458, 461 (¶ 12) (Miss. Ct. App. 2003), *Rehearing Denied* January 13, 2004, *Cert. Denied* July 15, 2004).

Michael believes that the Court cannot say anything about the Separation and Child Custody and Property Settlement Agreement because he had already made those decisions and Joesie signed off on it. Again, Michael fails to understand that in a divorce, the Court rules on the entire matter. The Court has to find that the property settlement is adequate and sufficient.

Michael states that it is inconsistent with *Hemsley* and *Ferguson* for the Court to award Joesie a part of Michael's military retirement. Michael is absolutely wrong because *Hemsley* directly addressed military retirement.

> There is a distinction between alimony and retirement benefits. In *Brown v. Brown,* 574 So.2d 688 (Miss.1990), this Court noted that the Federal Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (hereinafter FUSFSPA), "allowed the states to treat the military retirement pensions of their domiciliaries as personal property subject to state property laws." *Brown,* 574 So.2d at 690. In reference to a spouse's equitable right to a share of the other spouse's military retirement pay, this Court reiterated that a chancery court has authority, where

> equity so demands, to order a fair division of property accumulated through the joint contributions and efforts of the parties. *Brown,* 574 So.2d at 690. *See also* *Brendel v. Brendel,* 566 So.2d 1269, 1273 (Miss.1990); *Jones v. Jones,* 532 So.2d 574, 580-81 (Miss.1988); *Regan v. Regan,* 507 So.2d 54, 56 (Miss.1987); *Watts v. Watts,* 466 So.2d 889, 891 (Miss.1985); *Clark v. Clark,* 293 So.2d 447, 459 (1974).
>
> Assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage.
>
> In *Newman v. Newman,* 558 So.2d 821 (Miss.1990), this Court recognized that "a former spouse's rights vel non in his or her former mate's military retirement pension ... is *subject to the personal property laws of the states*...." *Id.* at 823 (emphasis added). In *Southern v. Glenn,* 568 So.2d 281 (Miss.1990), this Court stated that "[a] spouse's military retirement pension is an asset...." *Id.* at 283 n. 1. The chancellor had the authority to order a fair division of the retirement benefits since they were accumulated through the joint contributions and efforts of the parties. *Brown,* 574 So.2d at 690.

Hemsley v. Hemsley, 639 So. 2d 909, 914 (Miss. 1994).

The Court correctly addressed the *Ferguson* factors in making a judgment in regard to Joesie's 401K and Michael's military retirement. *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994).

Michael disagrees with the Court in its determination about the property on Steeplechase and the property where Joesie lives. Those two properties were listed in Paragraph 8 of the Separation and Child Custody and Property Settlement Agreement. [R. 201, 202; Joesie R.E. 67, 68]. Michael drafted the agreement. The lower Court's Judgment was in accord with the parties' Separation and Child Custody

and Property Settlement Agreement regarding the real property. Michael wants the Court to uphold the Separation and Child Custody and Property Settlement Agreement, but he says the Court erred by giving him the Steeplechase Drive property as he had provided in his Separation and Child Custody and Property Settlement Agreement.

Michael challenges the Court's determination of the *Ferguson* factors and calls granting of part of Michael's military retirement as not being equitable. Joesie did keep the household going while Michael was on deployment and kept it going up until the time that they filed for Divorce. That is the time that the Court cut off the military retirement, September 18, 2013. That was more than equitable.

The Court was within its power to cut off the marital portion of the military retirement at the date of divorce. If so, Joesie would have been entitled to a greater percentage of the military retirement than was Ordered by the Court. However in interpreting the Agreement, the Court limited the military retirement to the date that the Agreement was signed. The Court was very equitable towards Michael in limiting the marital portion of the military retirement.

Michael drafted his choices on the Property Settlement Agreement in taking the Steeple Chase property and allowing Joesie to stay at the Blue Meadows Road property. [R. 201, 202; Joesie R.E. 67, 68] Further, Michael attempted to hide a marital asset by not listing it, in his Property Settlement Agreement and not addressing it whatsoever. The lower Court was well within its authority to address

a marital asset. *Hemsley v. Hemsley*, 639 So. 2d 909 (Miss. 1994); *Traub,* 536 So. 2d 25.

Michael would have this Court reduce Joesie's alimony because she is awarded some of his military retirement. He cites as his authority *Ferguson* and *Hemsley*. However, Joesie is only receiving Three Hundred Dollars ($300.00) a month in alimony. That is for a period of five years from the date the agreement is ratified. Neither Michael or Joesie was receiving Military retirement at the time the divorce was granted. Therefore his argument that the alimony should be reduced by the amount of Military retirement that Joesie receives is without merit. Further, in his Separation and Child Custody and Property Settlement Agreement, he agreed to pay her Three Hundred Dollars ($300.00) per month from the time the agreement was ratified. [R. 202; Joesie R.E. 68]

Michael disagrees with the date the Court found the agreement was ratified. The agreement is not ratified until such time as the Court incorporates it into a Judgment. It is that date the Court finds it adequate and sufficient and is that date the Lower Court ratified the agreement for the alimony. The Court found that alimony was payable as stated in the Separation and Child Custody and Property Settlement Agreement from the time of the divorce for the duration as stated in the Agreement. Michael cites *Crosby v. Peoples Bank of Indianola*, 472 So. 2d 951 (Miss. 1985) as his authority for the alimony beginning the date the agreement was signed. *Crosby* was not a case regarding the parties to the contract arguing about the starting date. *Crosby* was about whether or not a security interest became effective in a note as

against a third party, being Peoples Bank of Indianola. That is far different than we have against two parties to a contract. The ratification on the parties Agreement is the date the Court entered its Judgment of Divorce. Michael owes alimony for five years from that date as provided in the Judgment of Divorce. This argument is without merit.

VI. THE LOWER COURT DID NOT ABUSE ITS DISCRETION AND DID NOT EMPLOY A WRONG LEGAL STANDARD WHEN IT DECIDED THE VISITATION FOR APPELLANT MICHAEL T. GERTY.

The Court is well within its discretion and should determine the visitation for the non custodial parent. Michael is aggrieved that the Court did not award him more than one month in the summer for his summer visitation. The Court has discretion in its award of visitation. The decision of the Chancellor regarding visitation is afforded great difference by the Supreme Court. *Horn v. Horn,* 909 So. 2d 1151, 1161 (¶ 38) (Miss. Ct. App. 1998). The non custodial parent's activities during visitation cannot be restricted by the Chancellor without compelling reasons, but when specifying times for visitation, the Chancellor has broad discretion. *Horn*, 909 So. 2d at 1162 (¶ 41).

While Michael might feel that he did not get adequate time in the summer to visit with the child, that was the discretion of the Court in deciding all of the factors. The Court did provide for summer visitation for Michael. He has an entire month which every other year includes July 4. The provision that the Court provided for the visitation for Michael is adequate and sufficient and this Court should uphold the decision of the Lower Court.

CONCLUSION

The Court was correct when it decided that an *Albright* analysis was necessary because the parties were contesting custody. When the *Albright* analysis was made the Court was correct when it awarded Joesie custody of the minor child Jayden Gerty.

The Court was correct when it found that there was no uncondoned adultery by Joesie. Joesie makes no argument one way or the other about the unconstitutionality of West's A.M.C. § 93-5-2. Any technical errors the Lower Court made in granting a divorce on the grounds of irreconcilable differences were harmless errors and that part of the Lower Court's Judgment should be upheld. The Amicus Brief should be dismissed since it discusses abused women or abused spouses and that is not the case in this divorce.

Further, the Court was correct in providing for Joesie to receive part of the military retirement of Michael upon his retirement from the Navy. The Court properly ruled to cover a marital asset that was not discussed and was not provided for in the Property Settlement Agreement. *Traub v. Johnson*, 536 So. 2d 25 (Miss. 1988).

Further the Court was within its discretion to ratify the alimony provision as of the date of divorce and to start Joesie's alimony at that time. The Court further was correct in deciding the amount of time that Michael would have visitation with the minor child and well within its broad discretion to so do.

The Chancery Court of the First Judicial District of Harrison County, Mississippi, was correct in its Judgment in regards to all issues regarding the divorce and the Lower Court should be upheld on all those issues. Again Joesie makes no issue as to the constitutionality of West's A.M.C. § 93-5-2.

RESPECTFULLY SUBMITTED this 30th day of March, 2018.

JOESIE R. GERTY

BY: *s/M. Channing Powell*
M. CHANNING POWELL
MSB#4465

OF COUNSEL:

s/M. Channing Powell
M. CHANNING POWELL
Attorney at Law
1915 23rd Avenue
P O Box 4253
Gulfport, MS 39502-4253
Telephone: (228) 864-5321
Facsimile: (228) 863-5748
Email: mcplaw@bellsouth.net

CERTIFICATE OF SERVICE

I, hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following: Muriel B. Ellis, Jim Hood, Attorney General, Justin L. Matheny, Honorable Jennifer Schloegel.

Further, I do hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Michael T. Gerty
366 Station Park Cir.
Grayslake, IL 60030

Joesie R. Gerty
13273 Blue Meadows Road
Pass Christian, MS 39571

SO CERTIFIED, this 30th day of March, 2018.

s/M. Channing Powell
M. CHANNING POWELL