

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

**APPELLEE'S RESPONSE TO
APPELLANT'S MOTION
FOR REHEARING**

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Appellee Joesie R. Gerty files her Response to the Motion for Rehearing filed by Appellant Michael T. Gerty and states as follows:

Michael’s Motion for Reconsideration centers on his allegation that this Mississippi Supreme Court did not use the record and make an *Albright*¹ analysis of the evidence. [M² page 2]. Michael says that he cannot believe that taken the Supreme Court’s opinion in regards to the lower Court’s Judgment, that it would feel that the custody decision was so spot on "that the Supreme Court of Mississippi would not need to so much as review the Chancery Court’s [Albright] analysis." [M page 2]. Michael further says “the Supreme Court of Mississippi did not consider the child custody at all in its original findings.” [M page 2]. Michael said that the only other reference about custody was just "a statement of fact, as if in-passing.” [M page 2]. Michael says "[t]his can be

¹ *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

² Michael’s Motion for Rehearing.

viewed only as a complete disregard of the single most important aspect of this case, the custody of Michael's minor son, Jayden." [Emphasis in original] [M page 2].

This Court found on page 13 of its Opinion³ that the Lower Court conducted an *Albright* analysis and found it to be in the best interest of Jayden that Joesie have the physical custody of the child. In the Lower Court, there was a temporary hearing and a trial. The Chancellor used the evidence, applied the factors and made an *Albright* custody determination in the temporary hearing and the trial. Michael's Motion to Reconsider requested the Chancellor reconsider the child custody matters. Again the Chancellor reconsidered and awarded Joesie custody of the child in her Amended Judgment. This Court had all of this information and had the record when it affirmed the Chancellor's findings regarding custody and support. [Opinion at page 5 (¶ 6)].

There is no case that holds the Supreme Court must make a detailed *Albright* analysis. There is no case that holds the Supreme Court must reiterate all of the *Albright* factors and apply the evidence to each factor and discuss how the Chancellor made her findings. There are cases where the Court affirmed the *Albright* findings with no discussion of the factors as was done in the instant case.

¶ 10. Where a chancellor has applied the correct legal standard and made findings of fact which are supported by substantial evidence, this Court will not reverse his decision. [*Touchstone v. Touchstone*, 682 So.2d 374, 377 \(Miss. 1996\)](#). As the record clearly reflects, the chancellor did consider all *Albright* factors and made findings of fact in the record with regard to these factors. The chancellor's decision was supported by the evidence, and it was not an abuse of discretion.

Darnell v. Darnell, 234 So.3d 421, 424 (¶ 10) (Miss. 2017).

³ The Opinion of the Mississippi Supreme Court dated December 13, 18.

Michael finds fault with the Chancellor saying at the temporary hearing that it was in the best interest of the "Mother" that she have custody of the minor child. [M page 4 and Michael's Brief ⁴ page 11]. Although the Chancellor or the Court Reporter did misstate and say "best interest of Mother", certainly the learned Chancellor meant that it was in the best interests of the child. She discussed the polestar consideration is the best interest of the child in the Temporary Order and 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 to this language from Michael's attorney. There had been an *Albright* analysis conducted and the Court was determining the best interests of the child. In fact the Court so stated. [R.⁵ 188].

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.

¶ 30. In a child custody case, "[t]his Court will not disturb a chancellor's judgment when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." [*Chapel v. Chapel*, 876 So.2d 290, 292–93 \(Miss.2004\)](#) (citing [*Townsend v. Townsend*, 859 So.2d 370, 371–72 \(Miss.2003\)](#)); see also [*Griffin v. Campbell*, 741 So.2d 936, 937 \(Miss.1999\)](#) ("A chancellor sitting as a finder of fact is given wide discretion"). "However, where the chancellor improperly considers and applies the *Albright* factors, an appellate court is obliged to find the chancellor in error." [*Hollon v. Hollon*, 784 So.2d 943, 946 \(Miss.2001\)](#). This Court will not overturn a chancellor's decision if there is substantial credible evidence in the record to support his findings of fact. [*Smith v. Jones*, 654 So.2d 480, 485 \(Miss.1995\)](#). "It is appropriate to consider here that our

⁴ Michael's initial Appellant Brief filed in this cause.

⁵ The record in this case as filed.

limited scope of review directs that ‘[w]e will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interests of the child.’ ” Ash v. Ash, 622 So.2d 1264, 1266 (Miss.1993) (quoting Yates v. Yates, 284 So.2d 46, 47 (Miss.1973)). Unless the evidence demands a finding contrary to the chancellor's decision, this Court will not disturb a custody ruling. Phillips v. Phillips, 555 So.2d 698, 700 (Miss.1989).

Copeland v. Copeland, 904 So.2d 1066, 1074 (¶ 30) (Miss. 2004).

This Court addressed the custody issues and found that an ***Albright*** analysis was conducted by the Chancellor and upheld her decision. Appellant’s Motion for Rehearing should be denied and dismissed.

Because Michael included argument in his Motion regarding the ***Albright*** factors and the evidence, Joesie shall also address them.

ARGUMENT

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

It is clear that the Chancellor applied the credible evidence and facts of the case to the factors as set forth in ***Albright*** in making an analysis to determine the best interests 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. It is clear that the Chancellor followed a process in which she considered all facts that are relevant to the child's best interest.

¶ 8. We may not always agree with a chancellor's decision as to whether the best interests of a child have been met, especially when we must review that decision by reading volumes of documents rather than through personal interaction with the parties before us. However, in custody cases, we are bound by the limits of our standard of review and may reverse only when the decision of the trial court was manifestly wrong

or clearly erroneous, or an erroneous legal standard was employed. [*Wright v. Stanley*, 700 So.2d 274, 280 \(Miss.1997\)](#); [*Williams v. Williams*, 656 So.2d 325, 330 \(Miss.1995\)](#). Our standard of review in child custody cases is very narrow. Like the chancellor, our polestar consideration must be the best interest of the child. However, it is not our role to substitute our judgment for his.

Hensarling v. Hensarling, 824 So.2d 583, 586-87 (¶ 8) (Miss. 2002).

The Chancellor decided that it was in Jayden's best interests that Joesie be awarded the physical care, custody and control of Jayden. The ***Albright*** factors are used to determine which parent should have custody 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”; (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.*

....

¶ 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 v. Vassar, 228 So. 3d 367, 374-75 (¶¶ 25, 27) (Miss. Ct. App. 2017).

The Chancellor addressed each of the *Albright* factors as they related to the relevant facts and determined that it was in Jayden's best interests that Joesie be awarded the physical care, custody and control of Jayden.

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 have agreed that a 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 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 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.⁶ 108].

Michael also accuses Joesie of moving in with Kyle's family after he took her out of the base housing at the SeaBee Base. Michael and Joesie lived in base housing at the SeaBee 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 choices were to go with Michael to Wisconsin or to find a place to live in Gulfport.

⁶ Josie's Record Excerpts previously filed in this cause.

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]. She believed they would reconcile 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 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]. Joesie 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.

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 and 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].

Michael says he puts top priority on raising Jayden. However at the time of trial, Michael had not obtained 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 tympanic membrane and the ear canal was normal, Michael still wanted to blame Joesie for wax build up in Jayden's ear. The evidence clearly shows 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 medical procedures to see the inside of the ear when there is 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]. Had the Court been inclined to discuss the willingness to provide primary care aspect, that matter would have favored Joesie.

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 discussed the fact that Jayden did have some behavioral problems in school while he was with him. [R. 427].

Michael makes much about the behavior of Jayden and says that this weighs in his favor. Michael did give testimony that Jayden's behavior is because of how his parents have been going on with this divorce. [R. 904].

Michael alleges Joesie does not discipline the child. The record shows 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. Further, Michael's dishonesty with the Court about how he treated medical conditions when the child was with him, shows he cannot be trusted to take care of the child.

3. Parent child bond: The Court found the child was bonded to both parents and the parents were equally bonded to the child. The Court found this 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 found 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 testified he did not take Jayden to Church, but he knew 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, 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 she knew 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: The Court found this factor favored both parties equally. 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 testified he trusted Joesie with the child and he trusted her to take the child to the Doctor. The Court found Michael and Joesie had about equal time with the child post separation and prior to the Judgment of the Court. The Court found this 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:

The Court was correct that this factor favors Joesie. Michael claims the Court muddled the water in this aspect by combining two things together. The *Albright* factors are to help identify the custody arrangement that would be in the child's best interest. *Vassar*, 228 So. 3d at 375 (¶ 26). The Court found Joesie's work schedule provided for her to have a better capacity to provide the primary care for the child. Joesie changed her work place so she would be able to take Jayden to school and pick him up after school. In her prior job, there were times when she would have to work as late as 8:00 p.m., which 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 take him to school. He needed help from Amy Malatag and Cherry. [R. 417]. When Michael was on the push schedule, he had to work many hours and there were times at night he had to be out working. [R. 258, 259]. Michael 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.

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

8. Moral fitness: The Court weighed the facts and the evidence and found this factor weighed slightly in favor of the father. Michael takes exception with the Court's finding of it being slightly in his favor. Apparently he would have this Court decide this factor was overwhelmingly in his favor. Michael would like for this factor to be so strong the Court could not help but to grant him custody of Jayden. Michael is wrong in his assumptions and in his analysis. There is absolutely no proof in the record that Joesie's adultery had an adverse impact on Jayden. The proof does show Jayden did know Kyle and may have seen him one time. The fact that Josie committed adultery had no adverse 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 any impact on Jayden.

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

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)).

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

It is hard to understand why Michael criticizes the Court by alleging the Chancellor placed no weight in its own determination, but in fact weighed this factor against the father. The Court was correct in calling the uncorroborated accusations against Michael into question. Michael had moved in with two women. He had been living with one of the women and her husband. That woman, Amy Malatag, was getting a divorce. 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 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 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 criticizes the Court by alleging the Chancellor was free with disparaging words regarding his character. One particular thing the Court found unbelievable was Michael’s testimony 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 Court determined that Joesie was credible regarding the child custody matters. 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 *Albright* findings that were supported by substantial evidence." *Bellais v. Bellais*, 931 So. 2d 665, 671 (¶ 31) (Miss. Ct. App. 2006).

Michael blames 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. Michael testified that Jayden did not have an ear infection while in his care. [R.750, 751; Joesie R.E. 155, 156] He presented a photograph and alleged Joesie was a bad parent by allowing the child to have a build up of wax in his ear. It was not until Michael was shown Jayden’s medical records at trial, that he admitted Jayden had an ear infection while with him. [R. 831, 840; Joesie R.E. 145, 154]. Further, he was dishonest with the Court

when testifying 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. 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 criticizes the Court for allowing in evidence the testimony of what Jayden told Joesie about Michael and Amy. The Court listens to the testimony and observes 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. Jayden even called her Auntie Amy. [R. 541, 921].

Again, the lower Court found this factor slightly favored Michael. Michael cannot stretch the evidence so far as to get the result he would like to have; that the 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 affirmed the Chancellor's decision on custody.

In his Motion, 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 Motion on pages 19-21 in regards to continuity of care prior to separation have been previously addressed in this Response and were addressed by the Lower Court, both at the temporary hearing and at trial.

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 this 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 home 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 finding 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 blames 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 shows. In fact Joesie testified that she does not go out to clubbing anymore. [R. 344, 345; Joesie R.E. 161, 162].

Michael does not believe the diagnosis of ADHD for Jayden. 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 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 once lived. 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. Jayden knows where his home and his school are located. Joesie changed her work so she would be able to meet the needs of the child and meet his time lines. Further, she changed her work schedule so 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 the home 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 it was in the best interests of the child that he remain in the custody of his mother. Michael went into other factors, but that was just a rehash of why the Court had an *Albright* hearing in the beginning. Further,

Michael believes his idea of weighing the *Albright* factors is best for the child. The Court weighed the *Albright* factors and found the best interests 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 v. Bellais, 931 So. 2d 665, 671 (¶ 31) (Miss. Ct. App. 2006).

It is clear the evidence produced at the temporary hearing and at trial supported the Chancellor's Judgment that Jayden should be in the custody of Joesie. A Chancellor is required to consider the *Albright* child custody factors when making a child custody decision. In the instant case, the Chancellor made an extensive Finding of Fact and thereafter set forth her determination of the facts regarding each of the *Albright* factors. An examination of the Chancellor's opinion reveals the *Albright* factors were clearly considered and applied. This Mississippi Supreme Court has stated it will not ponder whether it would have sized up the evidence differently.

¶ 33. The bottom line is that our narrow standard of review prevents us from pondering whether we would have sized up the evidence differently. Rather, we must give deference to the chancellor's factual findings, asking if they were supported by substantial evidence. See [Martin v. Lowery, 912 So.2d 461, 464 \(¶ 7\) \(Miss. 2005\)](#) (citing [Brooks v. Brooks, 652 So.2d 1113, 1124 \(Miss. 1995\)](#)). We have long

held chancellors have the ultimate discretion to weigh the evidence as they see fit when deciding what is in a particular child's best interest.

Smith v. Smith, 206 So.3d 502, 514 (¶ 33) (Miss. 2016).

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 interests to be in the custody of Joesie.

CONCLUSION

The Lower 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 Lower Court was correct when it awarded Joesie custody of the minor child, Jayden Gerty, because it was in his best interests. This Court was correct when it upheld the Chancellor on the custody issue. The Motion for Reconsideration of Appellant should be denied and dismissed.

RESPECTFULLY SUBMITTED this 8th day of January, 2019.

JOESIE R. GERTY

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

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:

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SO CERTIFIED, this 8th day of January, 2019.

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